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Supreme Court, U.S.

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# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1987

HALLIBURTON COMPANY,  
OCEANEERING INTERNATIONAL, INC. and  
McCLELLAND ENGINEERS, INC.,  
*Petitioners,*

v.

SHEREEN RAMONA ZIPFEL, VYNER GERARD ALBUQUERQUE,  
and CHAN LUCK CHEE,  
*Respondents.*

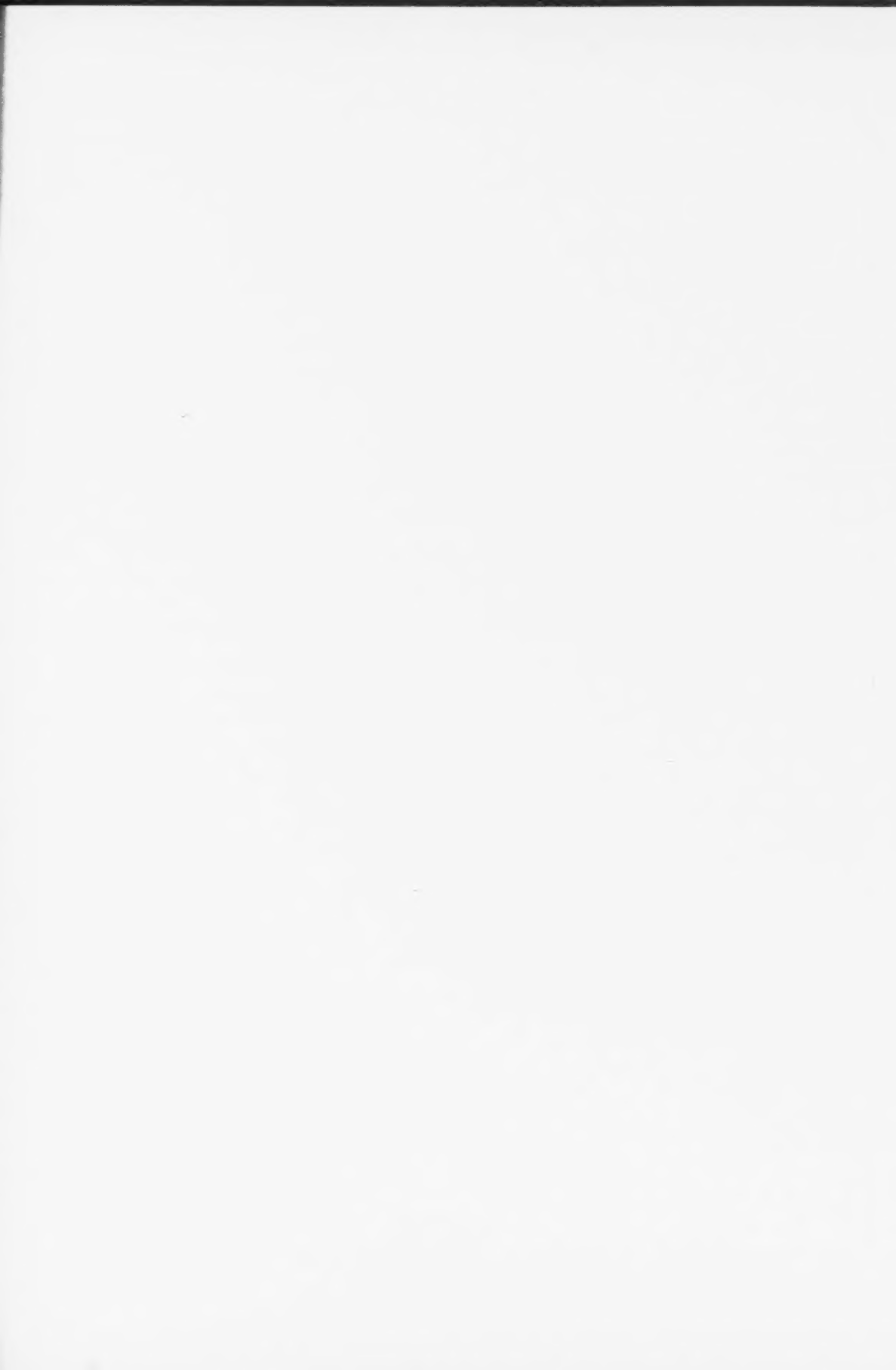
### Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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## QUESTIONS PRESENTED

1. Where a district court with discretion to dismiss a maritime action under the doctrine of *forum non conveniens* or transfer it to a more appropriate district<sup>1</sup> renders a final judgment of dismissal determining that the action should only be brought in a foreign forum (and not in any district of the United States)<sup>2</sup> and the plaintiff thereafter sues the same defendants on the same claim in a state court within a district of the United States in reliance upon the jurisdiction granted by the Saving-to-Suitors Clause,<sup>3</sup> may the district court not "protect or effectuate its judgment" within the meaning of the Anti-Injunction Act<sup>4</sup> by an injunction under the All-Writs Act.<sup>5</sup>

2. Subsidiary included questions are:

a. Is the district court's judgment not a "judgment" within the meaning of the Anti-Injunction Act?

b. Does the exception provided by the Saving-to-Suitors Clause to the district courts' exclusive jurisdiction of admiralty or maritime cases confer on suitors the power to maintain in a state court an admiralty or maritime claim contrary to the final decision of a district court that the claim should not be entertained in the United States?

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<sup>1</sup> 28 U.S.C. Section 1404.

<sup>2</sup> Respondents could have urged the alternative of transfer but did not and the issue is precluded by the judgments.

<sup>3</sup> 28 U.S.C. Sec. 1333.

<sup>4</sup> 28 U.S.C. Sec. 2283.

<sup>5</sup> 28 U.S.C. Sec. 1651.

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**Petition for Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit**

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, first entered in this case June 23, 1987, as to which rehearing was denied November 24, 1987.

### OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California is reported *sub nom.*, *Sherrill v. Brinkerhoff Maritime Drilling*, 615 F. Supp. 1021, 1985 A.M.C. 2855 (N.D. Cal. 1985), and is set forth in Appendix D. The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported, *Zipfel v. Halliburton Co.*, 820 F.2d 1438, 1987 A.M.C. 2642, (9th Cir. 1987), and is set forth in Appendix A. The amended opinion of the United States Court of Appeals for

the Ninth Circuit is reported, *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), and is set forth in Appendix B.

## JURISDICTION

On June 23, 1987, the Court of Appeals entered its judgment reversing so much of the decision of the District Court as enjoined the Respondents from prosecuting their claims in another court in the United States. A petition for rehearing was timely filed July 7, 1987, and was denied November 24, 1987. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### United States Constitution

#### Article I, Section 8, Clause 18:

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

#### Article III, Section 2, Clause 1 (in pertinent part):

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . .

### Title 28 U.S.C.

#### Sec. 1651 (a):

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

#### Sec. 1333 (in pertinent part):

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

- (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Sec. 2283:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

### STATEMENT OF THE CASE

These actions are based on an accident in the course of maritime employment. They were held by the district court not to be governed by American law. The court then dismissed them upon the ground of *forum non conveniens*, finding that the appropriate forum was in Singapore or Indonesia rather than in the United States. No contention was made by Respondents that the actions should instead be transferred to another district under 28 U.S.C. Sec. 1404(a) and no ground appears on which such a contention could be urged. Respondents having then commenced actions on the same claims in a court of Texas, the district court enjoined the prosecution of such actions in the United States. The Court of Appeals affirmed the holding as to choice of law and the dismissal of the actions but reversed the injunction, asserting that it was beyond the power of the district court because of the Anti-Injunction Act, 28 U.S.C. Sec. 2283.

These were among several related actions filed in the United States District Court for the Northern District of California by or on behalf of workmen killed or injured in an air crash in Indonesia. It was claimed that all the workmen were seamen and members of the crew of a drilling vessel to which they were en route. The plaintiffs invoked the Jones Act, 46 U.S.C. Sec. 688, the Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693, general maritime law, and state law. Appendix B-9. Despite arising from an air crash on land the claims are maritime and ultimately depended on the admiralty jurisdiction.<sup>6</sup>

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<sup>6</sup> The claims are asserted on the basis of employment on a vessel in navigable waters. Such employment is maritime. See, e.g., *De Lovio v. Boit*, 7 Fed. Cas. 418, 444 (C.C. Mass. 1815); *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919). Employment may give rise to maritime

Motions to dismiss the actions on the ground of *forum non conveniens* were granted, subject to conditions, the court finding that the appropriate forum was in Singapore or Indonesia instead of America. Instead of complying with the conditions, Respondents made service of a parallel Texas state court action. A permanent injunction against prosecuting any action arising out of the air crash in any court in the United States was included in the final judgment dismissing all of the plaintiffs' actions unconditionally. Appendix F. The Texas court had not ruled upon the issue of *res judicata* and the Full Faith and Credit Act<sup>7</sup> is not involved.<sup>8</sup>

The facts material to the disposition of the motions were undisputed and were summarized by the District Court. Appendix D-4 through D-6. The aircraft was operated by an Indonesian corporation and chartered by Hudbay Oil (Malacca Strait) Limited ("Hudbay") to transport employees between Singapore and Pekanbaru, Sumatra, whence the passengers were to be transported by helicopter to the drilling barge Brinkerhoff I.

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claims for accidents on land in travelling to or from work. *See, e.g., Hopson v. Texaco, Inc.*, 383 U.S. 262, 1966 A.M.C. 281 (1966). Apart from the Jones Act claims, the actions are not cognizable as federal questions under 28 U.S.C. Sec. 1331. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 1959 A.M.C. 832 (1959). As the plaintiffs are aliens and the alienage of some of the defendants is indicated by the caption and confirmed by the allegations of the complaints, diversity is lacking under the rule of *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806); *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148, 1986 A.M.C. 858 (5th Cir. 1985). Under the Jones Act the district court had jurisdiction sufficient to consider the application of that Act. *Romero*, 358 U.S. at 359, 1959 A.M.C. at 836. And when a Jones Act claim is properly alleged, the district court has jurisdiction to consider related claims as pendent to its Jones Act jurisdiction. *Romero*, 358 U.S. at 381, 1959 A.M.C. at 853. But when the Jones Act was held inapplicable there remained only the general admiralty jurisdiction over maritime claims.

<sup>7</sup> 28 U.S.C. Section 1738.

<sup>8</sup> *See Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. \_\_\_, 88 L. Ed. 2d 877 (1986).

The Brinkerhoff I is an American flag drilling barge, registered in San Francisco, California, owned by a Delaware corporation with its home office in San Francisco, with a contract negotiated in Indonesia, under which she was drilling in a lease concession in Indonesian waters.

The crews lived on board and rotated on and off at two-week intervals and the crash occurred as men were returning to the vessel. The aircraft was in contact with Indonesian air traffic controllers and Indonesian authorities investigated the crash and attributed it to pilot error and weather conditions. Appendix D-4 through D-5.

Respondents here are plaintiffs in three of the five claims involved in the appeal below. The district court found that Respondent Zipfel's decedent was employed by Halliburton Ltd., Respondent Chee by McClelland Engineers S.A., and Respondent Albuquerque by Oceaneering International, SDN, BHD., each a foreign subsidiary of a Petitioner here.<sup>9</sup> Decedent Zipfel was British and his wife, Respondent Shereen Ramona Zipfel, is Singaporean; Respondents Chee and Albuquerque are Singaporean.<sup>10</sup>

The District Court held that American law, and hence the Jones Act, applied to the American citizen employed by the vessel owner but not to the foreign injured plaintiffs and decedents. The Court of Appeals upheld the decision as to choice of law and also as to *forum non conveniens*, except for the case of the American decedent entitled to invoke the Jones Act. The court went on, however, to reverse the injunction against the prosecution of actions in Texas by the Respondents, as contrary to the Anti-Injunction Act, 28 U.S.C. Sec. 2283, upon the ground that the District Court's judgments were not "judgments" within the meaning of the third exception of that Act. In doing so the

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<sup>9</sup> The Court of Appeals, probably by inadvertent omission of text, made an error of fact and treated all the employers as subsidiaries of Petitioner Halliburton Company. Appendix B-11.

<sup>10</sup> The other two men were employees of the vessel owner. One was an American and one was an Australian. Appendix B-11.

court distinguished the case of *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987) cert. granted \_\_\_\_ U.S. \_\_\_\_, No. 87-505, apparently upon the ground that the injunction in that case was itself res judicata, on the basis of a mistaken understanding that a prior injunction had become final without appeal.

## REASONS FOR GRANTING THE WRIT

### I. The Decision Below Creates a Clear Conflict Among the Circuits

The Court has already granted certiorari in *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987) (No. 87-505 in this Court), with which the decision below is squarely in conflict. In *Exxon* the Court of Appeals upheld an injunction prohibiting the plaintiff from prosecuting in the courts of Texas an action upon a maritime claim which the district court had already dismissed under the doctrine of *forum non conveniens*. In doing so it necessarily held, and Judge Clark's concurring opinion made explicit, that the injunction was the exercise of the power to effectuate a judgment falling within the third exception to the Anti-Injunction Statute. Here the Court of Appeals has held to the contrary in indistinguishable circumstances.

In reaching its conclusion, the majority in *Exxon* took the "conditional view"<sup>11</sup> that the judgment of dismissal was res judicata. The Court of Appeals for the Ninth Circuit recognized that an injunction may be granted to protect the res judicata effect of a district court judgment but stated here that the district court had decided these cases on a "procedural point", evidently meaning that the judgments were not res judicata. Appendix B-25.

The Court of Appeals has taken the remarkable view that its decision is not in conflict with *Exxon*. If this were to be so, some way must be found to account for the Fifth Circuit decision without its traversing the Ninth Circuit view of the Anti-Injunction statute. To do this, the Court of Appeals for the Ninth

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<sup>11</sup> Judge Clark joined with Judge Gee on this issue upon the condition that it was necessary to be decided. 817 F.2d at 309, n.

Circuit posits an earlier (and presumably illegal) injunction against Chick Kam Choo, which had not been appealed from and was therefore final. The court then says that the injunction upheld in *Exxon* was issued to enforce that earlier and binding injunction, evidently regarding such an earlier (illegal) injunction as a judgment "on the merits". Appendix B-25.

That view is not only illogical but erroneous in fact. The opinion in *Exxon* gives no account of an earlier injunction and the petition for certiorari and brief in opposition in this Court do not indicate that there was any such earlier injunction. We respectfully suggest that this Court clearly observed the conflict between the two cases when it granted certiorari in *Exxon*.

The Court of Appeals is also in conflict with other circuits as to questions underlying its decision in this particular case. The court proceeds on the basis that the judgments here were not "on the merits" because they did not deal with the ultimate rights of Respondents to recover on their claims in some court; the court clearly means that judgments on the ground of *forum non conveniens* are not res judicata. The decision is in conflict with *Pastewka v. Texaco, Inc.*, 565 F.2d 851, 854, 1979 A.M.C. 190, 194 (3d Cir. 1977), holding that a *forum non conveniens* dismissal is res judicata, and also with *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1156-57, 1987 A.M.C. 2735, 2746-47 (5th Cir. 1987), where the court *en banc*, holding that federal standards apply to diversity cases, rejected analysis based upon the classification of *forum non conveniens* as a "procedural" matter.

## **II. The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been but Should Be Settled by This Court**

Both in cases denying and in cases upholding the power of the district courts to enjoin the prosecution of state proceedings, this Court has repeatedly illustrated, and in several instances explicitly declared, the importance of the scope of the Anti-Injunction Act because of its effect upon federal-state relations in a federal system. *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 348 U.S. 511, 513 (1955); *Atlantic Coast Line Rail-*

*road Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1970); *Mitchum v. Foster*, 407 U.S. 225, 231, 243 (1972); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 626, 630 (1977); *Parsons Steel, Inc. v. First Alabama Bank.*, 474 U.S. —, 88 L. Ed. 2d 877 (1986).

Important as they are, the Court's previous decisions have not, either directly or by analogy, settled the question presented here. Only two of those cases, *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, *supra*, and *Parsons Steel, Inc. v. First Alabama Bank*, *supra*, dealt with injunctions to "protect or effectuate" judgments under the third exception of the Act. In both cases the injunctions could not be sustained on that ground, in the former because it was not clear that the federal court judgment had the meaning claimed for it and in the latter because the injunction collided with the Full Faith and Credit Act since the state court had already ruled that the federal court judgment was not to be treated as *res judicata*. None of the cases cited deals with the effect of a final dismissal on the ground of *forum non conveniens*,<sup>12</sup> a frequent occurrence in the United States courts, and none deals with the jurisdiction of Jones Act claims and other maritime claims allowed to the jurisdiction of the states under the Savings-to-Suitors Clause.<sup>13</sup> While the

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<sup>12</sup> In *Parsons v. Chesapeake & Ohio Railroad Co.*, 375 U.S. 71, 73 (1963), where a state court had dismissed an action under the Federal Employers Liability Act, 45 U.S.C. Sec. 51 *et seq.* under the doctrine of *forum non conveniens* and a federal court in the same city felt thereafter bound to grant a motion to transfer under 28 U.S.C. Sec. 1404(a), the Court held that "principles of *res judicata* are not applicable to the situation here presented." The Court stressed the different considerations involved in the transfer and dismissal. The Court's analysis shows that the state court's dismissal on the ground that there was a better forum somewhere else did not mean that the better forum was the court to which the federal court seized of the case was asked to transfer it.

<sup>13</sup> In *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 243 (1942), where the Court rejected the view that a state court could apply state "procedural" law as to the burden of proof, the Court said:

We do not have in this case an effort of the state court to enforce rights claimed to be rooted in state law. The petitioner's suit rested

Court has declined to create an exception to the Anti-Injunction Act for all fields preempted by Congress, *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, *supra*, it has not considered the effect of a prior district court judgment on a maritime claim, where the primacy of the federal courts is established by the Constitution and the states are recognized to be bound by the constitutional doctrine of uniformity in the exercise of the limited jurisdiction conceded to them.

The question presented here should be settled by this Court because of its practical, as well as conceptual, impact. Members of the Court no doubt recognize that the occasions for the federal courts to consider cases under the doctrine of *forum non conveniens* have increased.<sup>14</sup> And cases of a certain sort seen on the record at a given moment are usually an indication of numerous others unseen. In an age of rapid travel and far-ranging international enterprise,<sup>15</sup> as well as internationally enterprising lawyers, forum-shopping flourishes on a grand scale. And if it is an evil in the selection of an initial court, it is a far greater evil in the resort to a second court to overrule or ignore the first.

The Court has presumably already recognized that the question presented should be settled, by granting certiorari in *Chick Kam Choo v. Exxon Corp.*, No. 87-505. The Court of Appeals in *Exxon*, 817 F.2d at 324, noted and disapproved another, similar case in Louisiana, *Kassapas v. Arkon Shipping Agency, Inc.*, 485 So.2d 565 (La. App. 5th Cir. 1986), *writ denied*, 488 So.2d 203 (La. 1986) *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 93 L. Ed. 2d 372

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on asserted rights granted by federal law and the state courts so treated it. Jurisdiction of the state court to try this case rests solely upon Sec. 33 of the Jones Act and upon statutes traceable to the Judiciary Act of 1789 which "in all civil causes of admiralty and maritime jurisdiction" saves to suitors "the right of a common-law remedy where the common law is competent to give it . . ." [footnotes omitted].

<sup>14</sup> See, e.g., instances cited in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 1982 A.M.C. 214 (1981).

<sup>15</sup> See, e.g., *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 8-9, 1972 A.M.C. 1407, 1413 (1972).

(1986).<sup>16</sup> In addition to the instant case in the Ninth Circuit there is now pending there a case, *Villar v. Crowley Maritime Corp.*, No. 86-2381, in which the plaintiff, represented by the same counsel as Respondents here and Petitioner in *Chick Kam Choo*, after dismissal by the district court in San Francisco and affirmance on appeal,<sup>17</sup> filed the same suit in the Superior Court in the same city and was enjoined from prosecuting it.

The decision of the Court of Appeals surely does not represent a jurisprudentially satisfactory settlement of the question. In authorizing suits in the state courts on certain maritime claims Congress presumably sought to save suitors from having to journey to inconvenient federal courts; it is at least very questionable whether the intention was that the suitor, after getting an unfavorable answer in the admiralty court, should be encouraged to seek a more favorable one in a state court. That would go far toward allowing the statutory exception to swallow the rule. The Court of Appeals, without any apparent analysis of the significance of the judgments before it and the weight which ought to be given to such judgments or to the relationship of the federal and state courts in the field of maritime claims, disposed of the matter lightly by saying that the judgment had turned on a "procedural point" and not "on the merits". Appendix B-25.

This Court has rejected the use of the epithet "procedural" as a means of deciding cases. In *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945), the Court clearly recognized the infirmity of such analysis:

Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key words to very different problems. Neither "substance" nor "procedure" represents the same in variance. Each implies different

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<sup>16</sup> The case was No. 86-195 on the docket of this Court.

<sup>17</sup> *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1987 A.M.C. 881 (9th Cir. 1986).

variables depending upon the particular problem for which it is used.

One of the cases with which the court illustrated the point was *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248-49 (1942), a maritime case which had come up through the state courts, where this Court held that a burden of proof, however it might be thought to be procedural, had such consequences that the federal rule must be used by the state court.

In *Hanna v. Plumer*, 380 U.S. 460 (1965), the Court reaffirmed its view that the dichotomy between "substance" and "procedure" was not adequate for deciding cases, while making clear that the criterion of "outcome-determination" is also not a universal rule. In both *Guaranty Trust* and *Hanna* the Court stressed the discouragement of forum-shopping as a ground for looking beyond the common epithets in deciding whether federal or state standards should be applied. Other courts of appeals have applied the principle of *Guaranty Trust* and *Hanna* in declining to treat *forum non conveniens* as a conclusion merely "procedural" or unworthy of the dignity of *res judicata*. E.g., *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1156-57, 1987 A.M.C. 2735, 2746-47 (5th Cir. 1987); *Pastewka v. Texaco, Inc.*, 565 F.2d 851, 854, 1979 A.M.C. 190, 194 (3d Cir. 1977).

*Guaranty Trust* and *Hanna* were cases involving the interplay of federal and state legislative jurisdiction as affecting actions in the federal courts and they arose in a context very closely related to the situation here, which involves the effects of the resulting judgments rather than the laws and rules to be applied in reaching them. The *Guaranty Trust* and *Hanna* cases indicate that neither the disparaging adjective "procedural" nor the test of outcome-determination should be used to decide the quality of a judgment for the purpose of applying it as *res judicata*.

The judgments below did not, after all, have the mere effect of a sanction for the violation of a court rule, allowing the plaintiffs to refile in compliance with the rule or in another court under different rules. Although granted for different reasons and on a different showing, the judgments had the same effect as though the Respondents' cases had been dismissed for lack of jurisdic-



APPENDIX A

REPRINTED WITH CORRECTIONS JUNE 25, 1987

FOR PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Nos. 86-1815, 86-1832, 86-1834, 86-1835, 86-1836

D.C. Nos. -

CV-83-0603-WWS, CV-83-0604-WWS, CV-83-0605-WWS,  
CV-83-0606-WWS, CV-83-0607-WWS

OPINION

SHEREEN RAMONA ZIPFEL, Individually and as Administratrix  
of Ian Charles Zipfel, deceased,  
Plaintiff-Appellant,

v.

HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY;  
CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME  
DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO,  
INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUSBAY  
OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING,  
PTD, LTD.; HUSBAY OIL (MALACCA), LTD.; DOME PETRO-  
LEUM, LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND  
GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; and  
EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

TEN FONG CRAIG, Individually and as Administratrix of the  
Estate of William Henry Craig, deceased,

Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME COR-  
PORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTI-  
NENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL &  
GAS COMPANY, LTD.; HUSBAY OIL, LTD. (INDONESIA); BRIN-  
KERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME  
DRILLING, PTE, LTD.; HUSBAY OIL (MALACCA), LTD.; DOME

PETROLEUM LTD.; DOME PETROLEUM CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

CHAN LUCK CHEE,

Plaintiff-Appellant,

v.

McCLELLAND ENGINEERS, INC.; McCLELLAND ENGINEERS, S.A.; McCLELLAND ENGINEERS SDN. BHD.; HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUDBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME DRILLING, PTE, LTD.; DOME PETROLEUM, LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

VYNER GERARD ALBUQUERQUE,

Plaintiff-Appellant,

v.

OCEANEERING INTERNATIONAL, INC.; OCEANEERING INTERNATIONAL, SDN, BHD.; HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUDBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, PTE, LTD.; HUDBAY OIL (MALACCA), LTD.; DOME PETROLEUM LTD.; DOME PETROLEUM CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

PATRICK PAUL GRUNKE,

Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUSBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME DRILLING, PTE, LTD.; HUSBAY OIL (MALACCA), LTD.; DOME PETROLEUM LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

Argued and Submitted

February 9, 1987—San Francisco, California

Filed June 23, 1987

Before: Mary M. Schroeder, Charles Wiggins and David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

Appeal from the United States District Court  
for the Northern District of California

William W. Schwarzer, District Judge, Presiding

### SUMMARY

#### Courts and Procedures/Injunctions

Appeal from dismissal. Affirmed in part, reversed in part, vacated in part, modified and remanded.

These related but onconsolidated actions were filed in the district court by or on behalf of American and foreign seamen who were killed or injured in an air crash in Indonesia. Motions to dismiss the actions on the ground of forum non conveniens were filed and denied. Upon reconsideration, another judge of the same court granted the motions and dismissed all of the cases, subject

to conditions. The district court then restrained, and later permanently enjoined, the plaintiffs and their attorneys from prosecuting any action arising out of the air crash in any court in the United States. The final judgment dismissed all of the appellants' actions, unconditionally, on the ground of *forum non conveniens*. This court affirms the district court's dismissal of the foreign seamen's claims and reverses the dismissal of the claim filed on behalf of the deceased American seaman. This court vacates that part of the permanent injunction enjoining the foreign seamen from prosecuting their claims in state court. This court modifies and affirms the grant of the permanent injunction as it pertains to the claim filed on behalf of the American seaman.

Appellants' claims arise out of an airplane crash in Indonesia. At the time of the crash, the airplane was transporting crew members of the oil drilling vessel, *Brinkerhoff I*, from Singapore to Indonesia, where the crew members were to be flown by helicopter to the vessel.

Judge Schwarzer chose to reconsider Judge Aguilar's denial of the appellees' *forum non conveniens* motions because, in his view, Judge Aguilar had failed to consider relevant Supreme Court precedent. Judge Schwarzer did not abuse his discretion by deciding to reconsider Judge Aguilar's prior ruling. This court reviews under the clearly erroneous standard the district court's findings of fact underlying its choice of law determination. This court treats all of the injured and deceased crew members as seamen. The findings of the district court support its conclusion that the drilling vessel qualification applies to the *Brinkerhoff I*. In determining whether the Jones Act applies to the claims of the foreign seamen, the district court focused on the factors which received greater weight in the drilling rig context. These factors point toward the application of foreign law to these claims. This court agrees with the district court's conclusion that foreign law, not American law, applies to the claims of the foreign seamen. It is conceded that American law applies to the claim on behalf of the deceased American seaman. The appellees have established that Singapore and Indonesia are satisfactory alternative fora. This court concludes that a satisfactory alternative forum exists for the resolution of these claims of the foreign seamen. This

court agrees with the district court's conclusion that the balance of the private interest factors tips in favor of dismissing, for forum non conveniens, the foreign seamen's lawsuits. The public interest factors weigh in favor of dismissal of the claims. The district court did not abuse its discretion in dismissing the foreign seamen's lawsuits for forum non conveniens, subject to the conditions which the district court imposed. The fact that the American seaman's claim has been filed in an American court on behalf of an American is a factor which points toward retention of the American seaman's case. What distinguishes the American seaman's claim from the claims of the foreign seamen, is the concession of the parties and the conclusion of the district court that the Jones Act applies to the claim for the deceased American. This court finds the decisions of other circuits which precludes dismissal of a Jones Act case for forum non conveniens to be persuasive. In view of the Supreme Court's comments as to the unavailability of the forum non conveniens doctrine in Federal Employers' Liability Act (FELA) cases, the degree of similarity between the specific venue provisions under the Jones Act and under the FELA, and the incorporation of the FELA into the Jones Act, this court believes that the forum non conveniens doctrine should be unavailable as a ground for dismissal under the Jones Act as it is under the FELA. This court holds that when the Jones Act applies to a seaman's claim, that claim may not be dismissed on the ground of forum non conveniens. When the district court dismissed the appellants' lawsuits for forum non conveniens, the appellants who did not settle their claims reactivated lawsuits they had previously filed in state court. In response to this, the district court enjoined the appellants and their attorneys from filing actions in any court in the United States arising out of the air crash. The first exception to the Anti-Injunction Act does not apply here, because there is no express statutory authorization for an injunction in this situation. The second exception applies to the American seaman's lawsuit, because, under this court's holding in this case, the district court will retain jurisdiction over that lawsuit. This exception does not apply to the foreign seamen's lawsuits because the district court no longer had jurisdiction over those suits. The third exception similarly does not support the district court's injunction. The grant of the injunction

against the foreign seamen prosecuting their lawsuits in state court violated the Anti-Injunction Act and was an abuse of discretion.

### COUNSEL

Benton Musselwhite, Houston, Texas, for the plaintiffs-appellants.

Earnest N. Reddick, San Francisco, California, for the defendants-appellees Crowley Maritime Corp., Brinkerhoff Maritime Drilling Corp., Brinkerhoff Maritime Drilling Corp., S.A., and Brinkerhoff Maritime Drilling Corp. PTE, LTD; Graydon S. Staring, San Francisco, California, for the defendant-appellee Halliburton Co.; Steven M. Perl, San Francisco, California, for the defendant-appellee McClelland Engineers, Inc.

Elliot L. Bien, San Francisco, California, for the defendant-appellee Oceaneering International, Inc.; James M. Derr, Los Angeles, California, for the defendants-appellees Atlantic Richfield Co. and Arco Oil & Gas Corp.; Robert J. Finan, San Francisco, California, for the defendant-appellee Conoco, Inc.

### OPINION

THOMPSON, Circuit Judge:

These related but unconsolidated actions were filed in the United States District Court for the Northern District of California by or on behalf of American and foreign seamen who were killed or injured in an air crash in Indonesia. The actions were filed under the Jones Act, 46 U.S.C. § 688, the Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693, general maritime law, and state law. Motions to dismiss the actions on the ground of *forum non conveniens* were filed and denied. Upon reconsideration, another judge of the same court granted the motions and dismissed all of the cases, subject to conditions. *Sherrill v. Brinkerhoff Maritime Drilling*, 615 F. Supp. 1021 (N.D. Cal. 1985). The dismissal order was filed August 12, 1985. It provided in part that the order would become final "as to any plaintiff upon that plaintiff's failure to have filed a

new action [in Indonesia or Singapore] upon the expiration of ninety days from the date of filing this order." No plaintiff filed such an action. Instead, a parallel Texas state court action which some of the plaintiffs had previously filed was reactivated. The district court then restrained, and later permanently enjoined, the plaintiffs and their attorneys from prosecuting any action arising out of the air crash in any court in the United States. This permanent injunction was included in a final judgment which the district court entered January 31, 1986. The final judgment dismissed all of the plaintiffs' actions, unconditionally, on the ground of *forum non conveniens*. A number of the cases originally filed were settled. Five cases remain, and are involved in this appeal.

We have jurisdiction under 28 U.S.C. § 1291. We affirm the district court's dismissal of the foreign seamen's claims. We reverse the dismissal of the claim filed on behalf of the deceased American seaman. We vacate that part of the permanent injunction enjoining the foreign seamen from prosecuting their claims in state court. We modify and affirm the grant of the permanent injunction as it pertains to the claim filed on behalf of the American seaman.

### FACTS AND PROCEEDINGS

The plaintiffs' claims arise out of a 1981 airplane crash at Simpang Tiga Airport in Indonesia. The airplane was operated by P.T. Airfast Services, an Indonesian corporation, and chartered by Hudbay Oil, an Indonesian subsidiary of a Canadian corporation. At the time of the crash, the airplane was transporting crew members of the oil drilling vessel, Brinkerhoff I, from Singapore to Indonesia, where the crew members were to be flown by helicopter to the vessel. The Brinkerhoff I is an American flag vessel. For approximately nineteen months prior to the crash, this vessel had operated in Far Eastern waters near Indonesia and Singapore. As the district court observed:

It is not disputed that the operative facts on which liability and damages are premised occurred in Indonesia, and to a lesser extent, in Singapore.

These include the maintenance and operation of the aircraft by Airfast, the chartering of the aircraft by Hudbay, and the actions of the crew and the Indonesian air traffic controllers. Eye witnesses and other knowledgeable persons are located there. Records and physical evidence relating to the operation and crash of the aircraft, the activities of the defendants, the injuries suffered by plaintiffs, and the post-accident investigation are also located there. It may be, as plaintiffs contend, that other evidence is scattered around the world, but none of it is shown to be located in this district. That the bulk of it is located in Singapore or Indonesia is demonstrated by plaintiffs' consolidated deposition notice . . .

*Sherrill*, 615 F.Supp. at 1031-32.

The Brinkerhoff I is owned by Brinkerhoff Maritime Drilling Corporation ("BMD"), a Delaware corporation with home offices in San Francisco. BMD's base of corporate operations was San Francisco, California, and the Brinkerhoff I's base of operations was either Singapore or Indonesia, or both.<sup>1</sup> The crew members whose claims are involved in this appeal were employees, respectively, of some of the defendants. BMD employed Grunke and decedent Craig; Halliburton Ltd. and Halliburton Inc. employed decedent Zipfel; McClelland S.A. and McClelland Engineering Inc. employed Chee; and P.T. Calmarine and Oceaneering employed Albuquerque. Decedent Craig was an American and his wife, plaintiff Ten Fong Craig, is Singaporean; decedent Zipfel was British and his wife, plaintiff Shereen Ramona Zipfel, is Singaporean; plaintiffs Chee and Albuquerque are Singaporean; and plaintiff Grunke is Australian.

The cases were originally assigned to District Judge Aguilar. The defendants moved to dismiss all of the actions on the ground

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<sup>1</sup> The specific location of the Brinkerhoff I's operations was determined by Atlantic Richfield Indonesia, Inc. ("ARII"), pursuant to a Day-Work Drilling Contract between BMD and ARII. Although plaintiffs make much of American choice of law and forum clauses in this contract, it is not relevant to this action that BMD and ARII agreed to resolve conflicts between themselves in America. See *Bailey v. Dolphin International, Inc.*, 697 F.2d 1268, 1276, n.24 (5th Cir. 1983).

of *forum non conveniens*. Judge Aguilar concluded that American law applied to all of the cases and denied the motions. The cases were subsequently reassigned to District Judge Schwarzer. The defendants renewed their *forum on conveniens* motions. Judge Schwarzer concluded that American law, and consequently the Jones Act, applied only to the claim of the American crew member, and foreign law applied to the claims of the foreign crew members. He then dismissed all of the cases on the ground of *forum non conveniens*, subject to conditions.<sup>2</sup> The permanent injunction and final judgment of dismissal followed.

## DISCUSSION

### A. The District Court's Reconsideration of Previous Denial of Motion

We review for abuse of discretion a district judge's decision to reconsider an interlocutory order by another judge of the same court. *Castner v. First National Bank*, 278 F.2d 376, 380 (9th Cir. 1960). In *Castner* we stated that the second judge does not conscientiously carry out his judicial function "if he permits what he believes to be a prior erroneous ruling to control the case." 278 F.2d at 380.

Judge Schwarzer chose to reconsider Judge Aguilar's denial of the defendants' *forum non conveniens* motions because, in his view, Judge Aguilar had failed to consider relevant Supreme Court precedent, including the Supreme Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and has failed to follow relevant Ninth Circuit precedent, including our decision in *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980), *cert. denied sub nom., Romilly v. Amoco Trinidad Oil Co.*, 451 U.S. 920 (1981). As we stated in *Castner*, "we are not concerned at this stage with whether the second judge is in fact correct, but

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<sup>2</sup> The conditions of dismissal were that the defendants (1) submit to the foreign court's jurisdiction, (2) waive any statute of limitations defenses, (3) make witnesses available, (4) not object to use of discovery materials and (5) agree to satisfy any judgment entered against them.

whether he was justified in reviewing the prior judge's ruling at all. [The second judge's] substantive ruling may be, as a matter of law, erroneous, yet his right and power to [reconsider the prior judge's interlocutory ruling] is perfectly justified as a matter of discretion." *Castner*, 278 F.2d at 380-81. Judge Schwarzer did not abuse this discretion by deciding to reconsider Judge Aguilar's prior ruling.

## B. The District Court's Forum Non Conveniens Dismissal Order

### 1. Standard of Review

We review for abuse of discretion a district court's dismissal of a case on the ground of *forum non conveniens*. *Piper*, 454 U.S. at 237; *Pereira v. Utah Transport, Inc.*, 764 F.2d 686, 690 (9th Cir. 1985), *cert. dismissed*, 106 S. Ct. 1253 (1986).

The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

*Piper*, 454 U.S. at 257 (citations omitted).

Before dismissing a case for *forum non conveniens*, a district court must first make a choice of law determination.<sup>3</sup> *Pereira*, 764 F.2d at 688. We review the district court's choice of law determination de novo. *Id.*; *Phillips*, 632 F.2d at 84. We review under the clearly erroneous standard the district court's findings of fact

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<sup>3</sup> The Second Circuit has stated that choice of law determination is not involved in a *forum non conveniens* analysis. *Cruz v. Maritime Co. of Phillippines*, 702 F.2d 47, 48 (2nd Cir. 1983) (per curiam). The Second Circuit stands alone in this view. See *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 292-93 (5th Cir. 1984); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Szumlicz v. Norwegian American Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983). See also Edelman, *Forum non Conveniens: Its Application in Admiralty Law*, 15 J. of Maritime Law and Commerce 517, 529-32 (1984).

underlying its choice of law determination. *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1479-80 (9th Cir. 1986).

## 2. Choice of Law

### a. The "Seaman Status" Requirement

For the Jones Act to apply, "seaman" status must be established. *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 (9th Cir. 1983). The district court assumed the injured and deceased crew members were "seaman." This assumption is not challenged on appeal. Accordingly, we treat all of the injured and deceased crew members as "seamen."

### b. Analysis

The Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953) listed seven factors to be considered in determining whether a claim is subject to the Jones Act: (1) place of the wrongful act; (2) the flag of the vessel; (3) allegiance or domicile of the injured party; (4) allegiance of the shipowner; (5) place and choice of law of the contract; (6) accessibility of a foreign forum; and (7) law of the forum. In *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-309 (1970), the Court added an eighth factor: the shipowner's base of operations.<sup>4</sup> In *Rhoditis*, the Court emphasized that the factors should not be applied in a mechanical fashion, and that the list is not exhaustive. *Id.*

#### (i) The "Drilling Vessel" Qualification

In cases involving typical "blue-water" vessels "plying international waters," the law of the flag is of "cardinal importance." *Lauritzen*, 345 U.S. at 584. "[T]he law of the flag [is applied] on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her." *Id.* at 585. For this reason, "the weight given to the ensign overbears

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<sup>4</sup> The analysis for determining whether the Jones Act applies to these claims is also controlling on the issue whether to apply American maritime law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

most other connecting events in determining applicable law" aboard traditional vessels. *Id.*

In cases involving atypical vessels such as semi-submersible or floating oil drilling vessels, however, courts do not give the law of the flag controlling weight; rather, other factors are emphasized. *Koke v. Phillips Petroleum Co.*, 730 F.2d 211, 219 (5th Cir. 1984); *Phillips*, 632 F.2d at 86-87. The place of the injury, the domicile of the injured person and the location where the employment contract was entered into take on greater significance. *Koke*, 730 F.2d at 219; *Phillips*, 632 F.2d at 86-87. The base of the vessel's day-to-day operations is considered to be more important than the location of the corporate headquarters. *Phillips*, 632 F.2d at 88.

Plaintiffs argue that the drilling vessel qualification should not apply to the *Brinkerhoff I* because it was not a stationary drilling rig.<sup>5</sup> Although *Phillips* involved a drilling rig which remained in one location for several years, the drilling rig analysis has been applied to vessels which do not remain in a single fixed location. In *Koke*, 730 F.2d at 219, the Fifth Circuit applied the drilling rig analysis to a non-stationary drilling vessel which could move under its own power. The *Koke* court described the vessel in these words:

While the *Sedco/Phillips SS* certainly has greater mobility than a fixed rig which may remain in place for several years, it was not, and was not designed to function as, a vessel "plying the seas" in the traditional sense. It is a semi-

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<sup>5</sup> Between 1979 and February 1983, the *Brinkerhoff I* operated at the following locations:

June 1979-Sept. 1979	South China Sea
Sept. 1979-Nov. 1979	Singapore Harbor
Nov. 1979-April 1981	Java Sea
April 1981-June 1981	Malacca Straits
June 1981	To Singapore Harbor for ten days of repairs
June 1981-Feb. 1983	Java Sea

The airplane crash out of which these cases arose occurred April 28, 1981.

submersible platform that rests on columns attached to flotation chambers. Its movements occur within a specific and limited geographical area. Further, when travel over long distances is required, it is apparently towed to a location. . . .

Id.

The district court found that the Brinkerhoff I was unable to move under its own power, had to be towed by other vessels when moved, and had remained for long periods of time prior to the accident at only a few drilling locations in the general vicinity of Indonesia. *Sherrill*, 615 F. Supp. at 1027-28. These findings support the district court's conclusion that the drilling vessel qualification applies to the Brinkerhoff I. *Koke*, 730 F.2d at 219.

(ii) Applying the Choice of Law Factors

The applicability of the Jones Act to the claim for the death of the American seaman was not disputed. Accordingly, the district court determined that the Jones Act applied to his claim. This determination is not challenged on appeal.<sup>6</sup>

In determining whether the Jones Act applies to the claims of the foreign seamen, the district court focused on the factors which receive greater weight in the drilling rig context. These factors point toward the application of foreign law to these claims. The place of the alleged wrongful act was Indonesia, the base of operations was Indonesia or, to a lesser extent, Singapore, and the employment contracts or other hiring arrangements were made in foreign locations. Moreover, the allegiance of the injured foreign seamen is foreign and a foreign forum is accessible to them. While other factors point toward application of American law (the law of the flag, the allegiance of the defendant shipowner, the corporate headquarters of the defendant shipowner, and the law of the forum), these factors are of lesser importance in a choice of law analysis where the vessel is a drilling rig as opposed

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<sup>6</sup> That all the claims in this case arise out of one occurrence does not require the application of uniform law to the claims of plaintiffs of differing nationalities. *In re Ocean Ranger Sinking Off Newfoundland on February 15, 1982*, 589 F. Supp. 302, 320 and n.21 (E.D. La. 1984).

to a typical blue-water vessel plying international waters. *Koke*, 730 F.2d at 219-20; *Phillips*, 632 F.2d at 86-88. The district court concluded that foreign law, not American law, applies to the claims of the foreign seamen. We agree.

### 3. Forum Non Conveniens Analysis

Having determined that foreign law applies to the claims of the foreign seamen, and it having been conceded that American law applies to the claim on behalf of the deceased American seaman, we now consider whether the district court erred in dismissing all of the claims for *forum non conveniens*. We consider separately the claims of the foreign seamen and the claim on behalf of the deceased American seaman.

#### a. The Foreign Seamen

##### i. Availability of an Alternative Forum

At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. [*Gulf Oil Corp. v. Gilbert*, 330 U.S. [501,] 506-507 [(1947)]]. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute. (citation omitted).

*Piper*, 454 U.S. at 254, n.22.

The defendants bear the burden of proving the existence of an adequate alternative forum. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir.), *cert. denied sub nom. Lui Su Nai-Chao v. Boeing Co.*, 464 U.S. 1017 (1983). They carried this burden. As to Singapore, the defendants submitted affidavits and declarations which showed that the courts of Singapore have jurisdiction over parties submitting to their jurisdiction, which submission may be by consent; that the defendants may waive the statute of limita-

tions; that discovery of documents and interrogatories are available, but depositions are allowed only in certain circumstances; that witnesses may be subpoenaed within Singapore; that Singapore permits third party indemnity claims; that Singapore has adopted English common law with respect to claims for personal injury and English law generally with respect to air transport cases, and has a wrongful death statute.

As to Indonesia, the defendants' affidavits and declarations established that Indonesian and foreign parties may submit to the jurisdiction of Indonesian courts by written consent; that under the Indonesian Civil Code, defendants may waive the statute of limitations; that the court can compel the attendance of witnesses; and that third party indemnity claims are permitted. These affidavits and declarations further showed that Indonesian courts would apply Indonesian law, and remedies would be available to the injured seamen and their survivors under Indonesia's Workmen's Compensation Law, under the Indonesian Civil Code for Negligence, under the Indonesian Carriage by Air Act, and under the Warsaw Convention.

The affidavits which the plaintiffs filed in the district court were insufficient to counter significantly the affidavits and declarations filed on behalf of the defendants. The plaintiffs, however, have now submitted supplemental affidavits which they ask us to consider for the first time on appeal. They contend these supplemental affidavits show that neither Singapore nor Indonesia is a satisfactory alternative forum. Normally, we will not permit the record on appeal to be supplemented with evidence not presented to the district court. *Karmun v. Commissioner*, 749 F.2d 567, 570 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 66 (1985). See Fed. R. App. P. 10(a); Ninth Circuit Rules 4(a), 4(b) and 13(a)(1). However, even if we were to consider the plaintiffs' proffered affidavits, we would still agree with the district court that the defendants have established that Singapore and Indonesia are satisfactory alternative fora.<sup>7</sup> Such alternative fora may not pro-

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<sup>7</sup> The defendants request that sanctions be imposed against the plaintiffs for attempting to submit supplemental affidavits on appeal. The request is denied.

an American court, but the remedies provided are not "so clearly inadequate or unsatisfactory that [there] is no remedy at all." *Piper*, 454 U.S. at 254. The plaintiffs' "potential damages award may be smaller, [but] there is no danger that they will be deprived of any remedy or treated unfairly." *Id.* at 255. Accordingly, we conclude that a satisfactory alternative forum exists for the resolution of these claims of the foreign seamen.

## ii. Private and Public Interest Factors

We have determined that foreign law is applicable to the claims of the foreign seamen, and that satisfactory alternative fora exist for the resolution of these claims. We now consider, and balance, the private interest and public interest factors described by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). We listed these factors in *Pereira*:

The private interest factors include: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses, and cost of obtaining attendance of willing witnesses; (3) possibility of viewing subject premises; (4) all other factors that render trial of the case expeditious and inexpensive. (citation omitted).

The public interest factors include: (1) administrative difficulties flowing from court congestion; (2) imposition of jury duty on the people of a community that has no relation to the litigation; (3) local interest in having localized controversies decided at home; (4) the interest in having a diversity case tried in a forum familiar with the law that governs the action; (5) the avoidance of unnecessary problems in conflicts of law. (citation omitted).

*Pereira* at 690.

### (a) The Private Interest Factors

In applying the private interest factors to the foreign seamen's claims, the district court noted that access to the sources of proof clearly pointed to trial in Singapore or Indonesia. Most of the evidence and witnesses are located at or near the crash site in

Indonesia or the airport in Singapore where the airplane was serviced and prepared for take-off.<sup>8</sup> The district court further noted that none of the evidence or witnesses was located in California, and that none of the material witnesses was subject to compulsory process in the district court, whereas many were located in Indonesia and Singapore and would be subject to process in those courts. Although plaintiffs have agreed to stipulate that they will pay all the costs of bringing these witnesses to the United States, they cannot assure that the witnesses will be willing to make this journey. The district court also noted that it may not be able to acquire personal jurisdiction over potential third-party defendants such as Airfast and the government of Indonesia. The district court concluded that the balance of the private interest factors tips in favor of dismissing, for *forum non conveniens*, the foreign seamen's lawsuits. We agree.

(b) The Public Interest Factors

In its consideration of the public interest factors, the district court found that the foreign seamen's lawsuits lacked a significant connection with the district court forum; that California had no interest in the actions; that the lawsuits would impose a burden on the district court's docket and would impede the ability of local litigants to get their cases to trial; that it would be a burden to the people of the community to have to sit as jurors on the cases; and that the application of foreign law in a foreign forum would not be inconsistent with the convenience of the foreign seamen. These findings weigh in favor of dismissal of the claims.

We conclude that the district court did not abuse its discretion in dismissing the foreign seamen's lawsuits for *forum non conveniens*, subject to the conditions which the district court imposed. See *Pereira*, 764 F.2d at 690 (approving similar conditions); *Koke*, 730 F.2d at 214 (same); *In re Ocean Ranger*, 589 F. Supp. at 323 (same).

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<sup>8</sup> Plaintiffs argue that a localized liability inquiry is not necessary because the cause of the crash was established as pilot error. Defendants have not admitted that pilot error was the sole cause of the plane crash, and suggest that some fault is attributable to Indonesian air traffic controllers.

### b. The American Seaman's Claim

Were we to apply a *forum non conveniens* analysis to the claim on behalf of the deceased American seaman, we might well conclude that his claim should also be dismissed. There are, after all, the same alternative fora available for resolution of his claim. The remedies are not as attractive as the remedy under the Jones Act, but notwithstanding this disadvantage, there still is a remedy. See *Piper*, 454 U.S. at 249 and 254. And, if we were to consider the private and public interest factors, we might conclude that they favor dismissal of the American seaman's case. The fact that this claim has been filed in an American court on behalf of an American is a factor which points toward retention of the American seaman's case. See *Piper*, 454 U.S. at 255-56 ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient"). But this factor is not decisive. *Id.*, n.23. What is decisive, however, and what distinguishes the American seaman's claim from the claims of the foreign seamen, is the concession of the parties and the conclusion of the district court that the Jones Act applies to the claim for the deceased American. The Fifth, Tenth and Eleventh Circuits (in cases involving claims by or on behalf of foreign seamen) have all held that if the Jones Act applies to a seaman's claim, dismissal for *forum non conveniens* is precluded. See *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 293 (5th Cir. 1984) ("this Court has held that if American law [i.e., the Jones Act] applies, a federal court should retain jurisdiction." (citation omitted)); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983) ("if American law [i.e., the Jones Act] is applicable to the case, the *forum non conveniens* doctrine is inapplicable." (citation omitted)); *Szumlicz v. Norwegian American Lines, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983) ("if United States law [i.e., the Jones Act] applies, the case should not be dismissed for *forum non conveniens*.").

Only the Second Circuit has taken a different view. See *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2nd Cir. 1983) (per curiam). Until this decision, "[i]t had been axiomatic . . . that if the Jones Act applied under *Rhoditis*, an American court could not decline to hear the case." Edelman, *Forum non Conveniens; Its Application in Admiralty Law*, 15 J. of Maritime Law

*veniens; Its Application in Admiralty Law*, 15 J. of Maritime Law and Commerce 517, 529. Although *Cruz* has recently been cited by the Second Circuit as standing for the proposition that "the *forum non conveniens* doctrine is applicable in Jones Act cases," *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 130 (2nd Cir. 1987) (a fraud and civil RICO action), it has been suggested that statements to this effect in *Cruz* are dicta because in *Cruz* American law did not apply to the injured seaman's claim. See Edelman, 15 J. of Maritime Law and Commerce 517, 530 (1984), reporting comments by Professor Y. N. Yiannopoulos, W. R. Irby Professor of Law at Tulane Law School. This suggestion appears to have merit. The injured seaman in *Cruz* was Filipino. He was injured while aboard a vessel which was passing through American waters. At the time of the injury, the vessel was moored in the Port of Camden, New Jersey. The owners and crew were all Philippine citizens, except one officer who was a U.S. citizen permanently residing in the Philippines. The vessel flew the Philippine flag. The defendant's principal base of operations was the Philippines. Considering all of these factors, the district court concluded that the Jones Act did not apply, and dismissed the case for *forum non conveniens*. *Cruz v. Maritime Co. of Philippines*, 549 F. Supp. 285 (S.D.N.Y. 1982), *aff'd* 702 F.2d 47 (2nd Cir. 1983). The Second Circuit did not address the question whether the Jones Act applied. Instead, in affirming the district court's dismissal, it stated that a choice of law analysis is not appropriate in a Jones Act case. 702 F.2d at 48. However, if the Jones Act did not apply to the case, as the facts suggested and the district court concluded, then this comment does indeed appear to be dictum.

In any event, however, we find the decisions of the Fifth, Tenth and Eleventh Circuits which preclude dismissal of a Jones Act case for *forum non conveniens* to be persuasive. This view is buttressed by decisions of the Supreme Court in which the Court has commented upon the unavailability of *forum non conveniens* as a basis for dismissal of cases filed under the Federal Employers' Liability Act (FELA). In *Gilbert*, the Court stated: "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*." 330 U.S. at 505. The Court

in *Gilbert* cited *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 (1941) for this proposition. In *Kepner*, the Court stated that the "privilege of venue, granted by the legislative body which created this right of action [under the FELA], cannot be frustrated for reasons of convenience or expense." 314 U.S. at 54. The Jones Act incorporates the FELA, 46 U.S.C. § 688(a),<sup>9</sup> and both the Jones Act and the FELA have specific venue provisions. The FELA provides in relevant part:

Under this chapter an action may be brought in a district court of the United States, in the district court of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing the action.

45 U.S.C. § 56.

The portion of the Jones Act which pertains to jurisdiction and venue provides:

Jurisdiction in [actions under the Jones Act] shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. § 688(a).

In view of the Supreme Court's comments as to the unavailability of the *forum non conveniens* doctrine in FELA cases, the degree of similarity between the specific venue provisions under the Jones Act and under the FELA, and the incorporation of the FELA into the Jones Act, we believe that the *forum non conveniens* doctrine should be unavailable as a ground for dismissal under the Jones Act as it is under the FELA. (Cf. *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310, n.10 (11th Cir. 1983) (suggesting that Congress implicitly spoke to, and rejected,

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<sup>9</sup> Section 688(a) of the Jones Act provides in relevant part: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." 46 U.S.C. § 688(a).

the *forum non conveniens* doctrine in both FELA and Jones Act cases); and see *Dalla v. Atlas Maritime Co.*, 562 F. Supp. 752, 757 (C.D. Cal. 1983) (“[W]hen a seaman has a cause of action based on American law, he comes by right into American courts.”), *aff’d* 771 F.2d 1277 (9th Cir. 1985). Finally, we see no reason to depart from the clear weight of authority in those circuits which have considered this question. We hold that when the Jones Act applies to a seaman’s claim, that claim may not be dismissed on the ground of *forum non conveniens*.

### C. The Injunction

When the district court dismissed the plaintiffs’ lawsuits for *forum non conveniens*, the plaintiffs who did not settle their claims reactivated lawsuits they had previously filed in the Texas state court. In response to this, the district court enjoined the plaintiffs and their attorneys from “filing and/or prosecuting actions in the state courts of Texas or any other court in the United States . . . arising out of the air crash on April 28, 1981. . . .” We review the grant of this injunction for abuse of discretion. *Golden v. Pacific Maritime Ass’n*, 786 F.2d 1425, 1426 (9th Cir. 1986).

The Anti-Injunction Act provides that:

A court of the United States may not grant an injunction to stay proceedings in a state court except [1] as expressly authorized by act of Congress or [2] where necessary in aid of its jurisdiction or [3] to protect or effectuate its judgment.

28 U.S.C. § 2283.

This court strictly construes these three exceptions to the Anti-Injunction Act. *Alton Box Board Co. v. Espirit de Corp.*, 682 F.2d 1267, 1271 (9th Cir. 1982).

The first exception to the Anti-Injunction Act does not apply here, because there is no express statutory authorization for an injunction in this situation. The second exception applies to the American seaman’s lawsuit, because, under our holding in this case, the district court will retain jurisdiction over that lawsuit. See *Alton Box*, 682 F.2d at 1271. This exception does not apply, however, to the foreign seamen’s lawsuits because the district

court no longer has jurisdiction over those suits. *Id.* The district court held that jurisdiction was more properly in a foreign forum and dismissed the foreign seaman's cases. At that point there was no need for an injunction to protect the district court's jurisdiction. *Id.*

The third exception to the Anti-Injunction Act similarly does not support the district court's injunction. This court has held that a district court may grant an injunction to protect the *res judicata* effect of its judgment "where a federal litigant has prevailed on the merits, yet is threatened with burdensome and repetitious relitigation of the same issues in a multiplicity of actions." *Golden*, 786 F.2d at 1427. Defendants argue that a determination on the merits is not required for an injunction against state court actions when a district court has dismissed a lawsuit for *forum non conveniens* arising in the same matters. The wording of our cases, however, is explicit, and refers to decisions on the merits. *See Golden*, 786 F.2d at 1427; *Midkiff v. Tom*, 725 F.2d 502, 504 (9th Cir. 1984). Here, defendants have prevailed on a procedural point pertaining to the propriety of the prosecution of the foreign seamen's lawsuit in a United States district court. No judgment on the merits has been rendered. The grant of the injunction against the foreign seamen prosecuting their lawsuits in state court violated the Anti-Injunction Act and was an abuse of discretion.

## CONCLUSION

The district court did not abuse its discretion in reconsidering the earlier denial of the defendants' *forum non conveniens* motions. The district court correctly determined that foreign law applies to the claims of the foreign seamen, and it did not abuse its discretion in dismissing the foreign seamen's lawsuits for *forum non conveniens*. The district court did abuse its discretion in dismissing the lawsuit on behalf of the deceased American seaman, because the Jones Act applies to this claim. *Nickol*, 743 F.2d 289; *Needham*, 719 F.2d 1481; *Szumlicz*, 698 F.2d 1192.

The injunction enjoining the foreign seamen from prosecuting their claims in state court is precluded by the Anti-Injunction

Act. Accordingly, that portion of the injunction is vacated. Since the district court will be retaining the lawsuit filed on behalf of the deceased American seaman, however, that portion of the injunction enjoining the prosecution of the lawsuit on his behalf in any other court in the United States is appropriate but is modified to except prosecution in the United States District Court for the Northern District of California. The portion of the judgment granting the permanent injunction as to the claim for the deceased American seaman is affirmed as modified.

**AFFIRMED IN PART, REVERSED IN PART, VACATED  
IN PART, MODIFIED AND REMANDED.**



**APPENDIX B**  
**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

Nos. 86-1815, 86-1832, 86-1834, 86-1835, 86-1836

D.C. Nos.

CV-83-0603-WWS, CV-83-0604-WWS, CV-83-0605-WWS,  
CV-83-0606-WWS, CV-83-0607-WWS

**ORDER AMENDING OPINION**

SHEREEN RAMONA ZIPFEL,

Individually and as Administratrix of Ian Charles Zipfel,  
deceased,

Plaintiff-Appellant,

v.

HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY;  
CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME  
DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO,  
INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUSBAY  
OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING,  
PTD, LTD.; HUSBAY OIL (MALACCA), LTD.; DOME PETROLEUM  
LTD.; DOME PETROLEUM CORPORATION; ARCO OIL and GAS  
CORPORATION; PT AIRFAST SERVICES INDONESIA; and EX-  
QUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

TEN FONG CRAIG, Individually and as Administratrix of the  
Estate of William Henry Craig, deceased,

Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME COR-  
PORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTI-  
NENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL &  
GAS COMPANY, LTD.; HUSBAY OIL, LTD. (INDONESIA); BRIN-  
KERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME  
DRILLING, PTE, LTD.; HUSBAY OIL (MALACCA), LTD.; DOME

PETROLEUM LTD.; DOME PETROLEUM CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

CHAN LUCK CHEE,

Plaintiff-Appellant,

v.

MCCLELLAND ENGINEERS, INC.; MCCLELLAND ENGINEERS, S.A.; MCCLELLAND ENGINEERS SDN. BHD.; HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUSBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME DRILLING, PTE, LTD.; DOME PETROLEUM LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

VYNER GERARD ALBUQUERQUE,

Plaintiff-Appellant,

v.

OCEANEERING INTERNATIONAL, INC.; OCEANEERING INTERNATIONAL, SDN, BHD.; HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUSBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, PTE, LTD.; HUSBAY OIL (MALACCA), LTD.; DOME PETROLEUM LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

PATRICK PAUL GRUNKE,

Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD; HUSBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME DRILLING, PTE, LTD.; HUSBAY OIL (MALACCA), LTD.; DOME PETROLEUM, LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court  
for the Northern District of California  
William W. Schwarzer, District Judge, Presiding

Argued and Submitted  
February 9, 1987—San Francisco, California

Filed June 23, 1987  
Amended November 24, 1987

Before: Mary M. Schroeder, Charles Wiggins and  
David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

## SUMMARY

### Courts and Procedure/Injunctions

Appeal from dismissal. Affirmed in part, reversed in part, vacated in part, modified and remanded.

These related but unconsolidated actions were filed in the district court by or on behalf of American and foreign seamen who were killed or injured in an air crash in Indonesia. Motions to dismiss the actions on the ground of forum non conveniens were filed and denied. Upon reconsideration, another judge of the same

court granted the motions and dismissed all of the cases, subject to conditions. The district court then restrained, and later permanently enjoined, the plaintiffs and their attorneys from prosecuting any action arising out of the air crash in any court in the United States. The final judgment dismissed all of the appellants' actions, unconditionally, on the ground of *forum non conveniens*. This court affirms the district court's dismissal of the foreign seamen's claims and reverses the dismissal of the claim filed on behalf of the American seaman. This court vacates that part of the permanent injunction enjoining the foreign seamen from prosecuting their claims in state court. This court modifies and affirms the grant of the permanent injunction as it pertains to the claim filed on behalf of the American seaman.

Appellants' claims arise out of an airplane crash in Indonesia. At the time of the crash, the airplane was transporting crew members of the oil drilling vessel, *Brinkerhoff I*, from Singapore to Indonesia, where the crew members were to be flown by helicopter to the vessel.

Judge Schwarzer chose to reconsider Judge Aguilar's denial of the appellees' *forum non conveniens* motions because, in his view, Judge Aguilar had failed to consider relevant Supreme Court precedent. Judge Schwarzer did not abuse his discretion by deciding to reconsider Judge Aguilar's prior ruling. This court reviews under the clearly erroneous standard the district court's findings of fact underlying its choice of law determination. This court treats all of the injured and deceased crew members as seamen. The findings of the district court support its conclusion that the drilling vessel qualification applies to the *Brinkerhoff I*. In determining whether the Jones Act applies to the claims of the foreign seamen, the district court focused on the factors which received greater weight in the drilling rig context. These factors point toward the application of foreign law to these claims. This court agrees with the district court's conclusion that foreign law, not American law, applies to the claims of the foreign seamen. It is conceded that American law applies to the claim on behalf of the deceased American seaman. The appellees have established that Singapore and Indonesia are satisfactory alternative fora. This court concludes that a satisfactory alternative forum exists

for the resolution of these claims of the foreign seamen. This court agrees with the district court's conclusion that the balance of the private interest factors tips in favor of dismissing, for forum non conveniens, the foreign seamen's lawsuits. The public interest factors weigh in favor of dismissal of the claims. The district court did not abuse its discretion in dismissing the foreign seamen's lawsuits for forum non conveniens, subject to the conditions which the district court imposed. The fact that the American seaman's claim has been filed in an American court on behalf of an American is a factor which points toward retention of the American seaman's case. What distinguishes the American seaman's claim from the claims of the foreign seamen, is the concession of the parties and the conclusion of the district court that the Jones Act applies to the claim for the deceased American. This court finds the decisions of other circuits which precludes dismissal of a Jones Act case for forum non conveniens to be persuasive. In view of the Supreme Court's comments as to the unavailability of the forum non conveniens doctrine in Federal Employers' Liability Act (FELA) cases, the degree of similarity between the specific venue provisions under the Jones Act and under the FELA, and the incorporation of the FELA into the Jones Act, this court believes that the forum non conveniens doctrine should be unavailable as a ground for dismissal under the Jones Act as it is under the FELA. This court holds that when the Jones Act applies to a seaman's claim, that claim may not be dismissed on the ground of forum non conveniens. When the district court dismissed the appellants' lawsuits for forum non conveniens, the appellants who did not settle their claims reactivated lawsuits they had previously filed in state court. In response to this, the district court enjoined the appellants and their attorneys from filing actions in any court in the United States arising out of the air crash. The first exception to the Anti-Injunction Act does not apply here, because there is no express statutory authorization for an injunction in this situation. The second exception applies to the American seaman's lawsuit, because, under this court's holding in this case, the district court will retain jurisdiction over that lawsuit. This exception does not apply to the foreign seamen's lawsuits because the district court no longer had jurisdiction over those suits. The third exception similarly does not

support the district court's injunction. The grant of the injunction against the foreign seamen prosecuting their lawsuits in state court violated the Anti-Injunction Act and was an abuse of discretion.

### COUNSEL

Benton Musselwhite, Houston, Texas, for the plaintiffs-appellants.

Earnest N. Reddick, San Francisco, California, for the defendants-appellees Crowley Maritime Corp., Brinkerhoff Maritime Drilling Corp., Brinkerhoff Maritime Drilling Corp., S.A., and Brinkerhoff Maritime Drilling Corp. PTE, LTD; Graydon S. Staring, San Francisco, California, for the defendant-appellee Halliburton Co; Steven M. Perl, San Francisco, California, for the defendant-appellee McClelland Engineers, Inc.

Elliot L. Bien, San Francisco, California, for the defendant-appellee Oceaneering International, Inc.; James M. Derr, Los Angeles, California, for the defendants-appellees Atlantic Richfield Co. and Arco Oil & Gas Corp.; Robert J. Finan, San Francisco, California, for the defendant-appellee Conoco, Inc.

### ORDER

The opinion filed June 23, 1987 is amended as follows:

#### I

The third sentence of the first grammatical paragraph on page 11 of the slip opinion is deleted. This deleted sentence reads: "BMD employed Grunke and decedent Craig; Halliburton Ltd. and Halliburton Inc. employed decedent Zipfel; McClelland S.A. and McClelland Engineering Inc. employed Chee; and P. T. Calmarine and Oceaneering employed Albuquerque."

The deleted sentence is replaced with the following sentence: "BMD employed Grunke and decedent Craig; the district court found that Zipfel was employed by Halliburton Ltd., Chee by McClelland Engineers S.A., and Albuquerque by Oceaneering

International, S.D.N. B.H.D., each a foreign subsidiary of defendants/appellees Halliburton Company.”

A new reference to footnote 9 is added at the end of the paragraph which begins on page 22 of the slip opinion with the words “Were we to apply a *forum non conveniens* analysis to the claim on behalf of . . .”, and which ends on page 23 with the words “. . . should not be dismissed for *forum non conveniens*.” New footnote 9 provides:

“The Fifth Circuit has recently signaled its departure from this position. *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1163 n.25 (5th Cir. 1987). In footnote 25 of *Air Crash*, a divided en banc panel of the Fifth Circuit, with Judges Garza, Johnson, Garwood, and Higginbotham not joining in the footnote, stated that in view of the Supreme Court’s opinion in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and the district court’s analysis in the present case, *Sherrill v. Brinkerhoff Maritime Drilling*, 615 F. Supp. 1021, 1034-35 (N.D. Cal. 1985), it disapproved and overruled all of its Jones Act case law in which it had previously held that if the Jones Act applied to a case, then the case should not be dismissed for *forum non conveniens*. *Air Crash*, 821 F.2d at 1163 n.25. *Air Crash* was not a Jones Act case.

### III

The footnote reference in the text on page 24 of the slip opinion is changed from 9 to 10, as is the numbering of the footnote at the bottom of that page.

### IV

The following is inserted in the opinion just above “CONCLUSION” after the paragraph on page 27 of the slip opinion which ends with the words “. . . an abuse of discretion.”:

The recent Fifth Circuit case of *Exxon Corporation v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987) is inapposite. In *Exxon*, the surviving wife of a seaman who had been

injured and died on board ship in Singapore, brought suit in the federal district court in Houston, Texas. The district court granted the defendants' motion for summary judgment "as to Plaintiffs' claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers Compensation Act, and the general maritime laws of the United States." *Exxon*, 817 F.2d at 310 n.4 (emphasis in original). Having thus disposed of these claims on the merits, the court nonetheless granted the defendants' motion to dismiss "under the doctrine of *forum non conveniens*, . . . without prejudice," and subject to conditions which permitted the plaintiff to refile her suit in Singapore. *Id.*

The judgment permanently enjoined the plaintiff from prosecuting any action against the defendants in the courts of Texas or any other state, arising out of or related to the death of the plaintiff's husband on board ship in Singapore. The plaintiff did not appeal this judgment and it became final. She then attempted to pursue, against the defendants in the state court in Houston, Texas, the same claims she had filed against them in the federal district court in Houston. The defendants filed a new suit in federal court in Houston to enjoin the state proceeding. The district court granted a permanent injunction enjoining the state proceeding and sanctioned the plaintiff's attorneys for pursuing it.

The Fifth Circuit, with one member of the three-judge panel concurring and one dissenting, affirmed the judgment of the district court. What established the opinion as a majority opinion was the concurrence of Judge Clark. He pointed out that the plaintiff was simply bound by the earlier judgment which enjoined her from relitigating the case in state court; he did not concur in Judge Gee's *forum non conveniens* analysis. *Exxon*, therefore, is not a majority opinion on *forum non conveniens* and hence is not in conflict with our unanimous opinion in this case.

## OPINION

THOMPSON, Circuit Judge:

These related but unconsolidated actions were filed in the United States District Court for the Northern District of California by or on behalf of American and foreign seamen who were killed or injured in an air crash in Indonesia. The actions were filed under the Jones Act, 46 U.S.C. § 688, the Shipowners Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693, general maritime law, and state law. Motions to dismiss the actions on the ground of *forum non conveniens* were filed and denied. Upon reconsideration, another judge of the same court granted the motions and dismissed all of the cases, subject to conditions. *Sherrill v. Brinkerhoff Maritime Drilling*, 615 F. Supp. 1021 (N.D. Cal. 1985). The dismissal order was filed August 12, 1985. It provided in part that the order would become final "as to any plaintiff upon that plaintiff's failure to have filed a new action [in Indonesia or Singapore] upon the expiration of ninety days from the date of filing this order." No plaintiff filed such an action. Instead, a parallel Texas state court action which some of the plaintiffs had previously filed was reactivated. The district court then restrained, and later permanently enjoined, the plaintiffs and their attorneys from prosecuting any action arising out of the air crash in any court in the United States. This permanent injunction was included in a final judgment which the district court entered January 31, 1986. The final judgment dismissed all of the plaintiffs' actions, unconditionally, on the ground of *forum non conveniens*. A number of the cases originally filed were settled. Five cases remain, and are involved in this appeal.

We have jurisdiction under 28 U.S.C. § 1291. We affirm the district court's dismissal of the foreign seamen's claims. We reverse the dismissal of the claim filed on behalf of the deceased American seaman. We vacate that part of the permanent injunction enjoining the foreign seamen from prosecuting their claims in state court. We modify and affirm the grant of the permanent injunction as it pertains to the claim filed on behalf of the American seaman.

## FACTS AND PROCEEDINGS

The plaintiffs' claims arise out of a 1981 airplane crash at Simpang Tiga Airport in Indonesia. The airplane was operated by P.T. Airfast Services, an Indonesian corporation, and chartered by Hudbay Oil, an Indonesian subsidiary of a Canadian corporation. At the time of the crash, the airplane was transporting crew members of the oil drilling vessel, Brinkerhoff I, from Singapore to Indonesia, where the crew members were to be flown by helicopter to the vessel. The Brinkerhoff I is an American flag vessel. For approximately nineteen months prior to the crash, this vessel had operated in Far Eastern waters near Indonesia and Singapore. As the district court observed:

It is not disputed that the operative facts on which liability and damages are premised occurred in Indonesia, and to a lesser extent, in Singapore. These include the maintenance and operation of the aircraft by Airfast, the chartering of the aircraft by Hudbay, and the actions of the crew and the Indonesian air traffic controllers. Eye witnesses and other knowledgeable persons are located there. Records and physical evidence relating to the operation and crash of the aircraft, the activities of the defendants, the injuries suffered by plaintiffs, and the post-accident investigation are also located there. It may be, as plaintiffs contend, that other evidence is scattered around the world, but none of it is shown to be located in this district. That the bulk of it is located in Singapore or Indonesia is demonstrated by plaintiffs' consolidated deposition notice . . .

*Sherrill*, 615 F. Supp. at 1031-32.

The Brinkerhoff I is owned by Brinkerhoff Maritime Drilling Corporation ("BMD"), a Delaware corporation with home offices in San Francisco. BMD's base of corporate operations was San Francisco, California, and the Brinkerhoff I's base of operations was either Singapore or Indonesia, or both.<sup>1</sup> The crew members

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<sup>1</sup> The specific location of the Brinkerhoff I's operations was determined by Atlantic Richfield Indonesia, Inc. ("ARII"), pursuant to a Day-Work Drilling Contract between BMD and ARII. Although plain-

whose claims are involved in this appeal were employees, respectively, of some of the defendants. BMD employed Grunke and decedent Craig; the district court found that Zipfel was employed by Halliburton Ltd., Chee by McClelland Engineers S.A., and Albuquerque by Oceaneering International, S.D.N. B.H.D., each a foreign subsidiary of defendants/appellees Halliburton Company. Decedent Craig was an American and his wife, plaintiff Ten Fong Craig, is Singaporean; decedent Zipfel was British and his wife, plaintiff Shereen Ramona Zipfel, is Singaporean; plaintiffs Chee and Albuquerque are Singaporean; and plaintiff Grunke is Australian.

The cases were originally assigned to District Judge Aguilar. The defendants moved to dismiss all of the actions on the ground of *forum non conveniens*. Judge Aguilar concluded that American law applied to all of the cases and denied the motions. The cases were subsequently reassigned to District Judge Schwarzer. The defendants renewed their *forum non conveniens* motions. Judge Schwarzer concluded that American law, and consequently the Jones Act, applied only to the claim of the American crew member, and foreign law applied to the claims of the foreign crew members. He then dismissed all of the cases on the ground of *forum non conveniens*, subject to conditions.<sup>2</sup> The permanent injunction and final judgment of dismissal followed.

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tiffs make much of American choice of law and forum clauses in this contract, it is not relevant to this action that BMD and ARII agreed to resolve conflicts between themselves in America. See *Bailey v. Dolphin International, Inc.*, 697 F.2d 1268, 1276, n.24 (5th Cir. 1983).

<sup>2</sup> The conditions of dismissal are that the defendants (1) submit to the foreign court's jurisdiction, (2) waive any statute of limitations defenses, (3) make witnesses available, (4) not object to use of discovery materials and (5) agree to satisfy any judgment entered against them.

## DISCUSSION

## A. The District Court's Reconsideration of Previous Denial of Motion

We review for abuse of discretion a district judge's decision to reconsider an interlocutory order by another judge of the same court. *Castner v. First National Bank*, 278 F.2d 376, 380 (9th Cir. 1960). In *Castner* we stated that the second judge does not conscientiously carry out his judicial function "if he permits what he believes to be a prior erroneous ruling to control the case." 278 F.2d at 380.

Judge Schwarzer chose to reconsider Judge Aguilar's denial of the defendants' *forum non conveniens* motions because, in his view, Judge Aguilar had failed to consider relevant Supreme Court precedent, including the Supreme Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and has failed to follow relevant Ninth Circuit precedent, including our decision in *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980), *cert. denied sub nom., Romilly v. Amoco Trinidad Oil Co.*, 451 U.S. 920 (1981). As we stated in *Castner*, "we are not concerned at this stage with whether the second judge is in fact correct, but whether he was justified in reviewing the prior judge's ruling at all. [The second judge's] substantive ruling may be, as a matter of law, erroneous, yet his right and power to [reconsider the prior judge's interlocutory ruling] is perfectly justified as a matter of discretion." *Castner*, 278 F.2d at 380-81. Judge Schwarzer did not abuse this discretion by deciding to reconsider Judge Aguilar's prior ruling.

## B. The District Court's Forum Non Conveniens Dismissal Order

## 1. Standard of Review

We review for abuse of discretion a district court's dismissal of a case on the ground of *forum non conveniens*. *Piper*, 454 U.S. at 237; *Pereira v. Utah Transport, Inc.*, 764 F.2d 686, 690 (9th Cir. 1985), *cert. dismissed*, 106 S. Ct. 1253 (1986).

The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed

only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

*Piper*, 454 U.S. at 257 (citations omitted).

Before dismissing a case for *forum non conveniens*, a district court must first make a choice of law determination.<sup>3</sup> *Pereira*, 764 F.2d at 688. We review the district court's choice of law determination de novo. *Id.*; *Phillips*, 632 F.2d at 84. We review under the clearly erroneous standard the district court's findings of fact underlying its choice of law determination. *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1479-80 (9th Cir. 1986).

## 2. Choice of Law

### a. The "Seaman Status" Requirement

For the Jones Act to apply, "seaman" status must be established. *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 (9th Cir. 1983). The district court assumed the injured and deceased crew members were "seamen." This assumption is not challenged on appeal. Accordingly, we treat all of the injured and deceased crew members as "seamen."

### b. Analysis

The Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953) listed seven factors to be considered in determining whether a claim is subject to the Jones Act: (1) place of the wrongful act; (2) the flag of the vessel; (3) allegiance or domicile of the injured party; (4) allegiance of the shipowner; (5) place

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<sup>3</sup> The Second Circuit has stated that a choice of law determination is not involved in a *forum non conveniens* analysis. *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2nd Cir. 1983) (per curiam). The Second Circuit stands alone in this view. See *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 292-93 (5th Cir. 1984); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Szumlicz v. Norwegian American Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983). See also Edelman, *Forum non Conveniens: Its Application in Admiralty Law*, 15 J. of Maritime Law and Commerce 517, 529-32 (1984).

and choice of law of the contract; (6) accessibility of a foreign forum; and (7) law of the forum. In *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-309 (1970), the Court added an eighth factor: the shipowner's base of operations.<sup>4</sup> In *Rhoditis*, the Court emphasized that the factors should not be applied in a mechanical fashion, and that the list is not exhaustive. *Id.*

#### (i) The "Drilling Vessel" Qualification

In cases involving typical "blue-water" vessels "plying international waters," the law of the flag is of "cardinal importance." *Lauritzen*, 345 U.S. at 584. "[T]he law of the flag [is applied] on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her." *Id.* at 585. For this reason, "the weight given to the ensign overbears most other connecting events in determining applicable law" aboard traditional vessels. *Id.*

In cases involving atypical vessels such as semi-submersible or floating oil drilling vessels, however, courts do not give the law of the flag controlling weight; rather, other factors are emphasized. *Koke v. Phillips Petroleum Co.*, 730 F.2d 211, 219 (5th Cir. 1984); *Phillips*, 632 F.2d at 86-87. The place of the injury, the domicile of the injured person and the location where the employment contract was entered into take on greater significance. *Koke*, 730 F.2d at 219; *Phillips*, 632 F.2d at 86-87. The base of the vessel's day-to-day operations is considered to be more important than the location of the corporate headquarters. *Phillips*, 632 F.2d at 88.

Plaintiffs argue that the drilling vessel qualification should not apply to the Brinkerhoff I because it was not a stationary drilling rig.<sup>5</sup> Although *Phillips* involved a drilling rig which remained in

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<sup>4</sup> The analysis for determining whether the Jones Act applies to these claims is also controlling on the issue whether to apply American maritime law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

<sup>5</sup> Between 1979 and February 1983, the Brinkerhoff I operated at the following locations:

one location for several years, the drilling rig analysis has been applied to vessels which do not remain in a single fixed location. In *Koke*, 730 F.2d at 219, the Fifth Circuit applied the drilling rig analysis to a non-stationary drilling vessel which could move under its own power. The *Koke* court described the vessel in these words:

While the Sedco/Phillips SS certainly has greater mobility than a fixed rig which may remain in place for several years, it was not, and was not designed to function as, a vessel "plying the seas" in the traditional sense. It is a semi-submersible platform that rests on columns attached to flotation chambers. Its movements occur within a specific and limited geographical area. Further, when travel over long distances is required, it is apparently towed to a location. . . .

*Id.*

The district court found that the Brinkerhoff I was unable to move under its own power, had to be towed by other vessels when moved, and had remained for long periods of time prior to the accident at only a few drilling locations in the general vicinity of Indonesia. *Sherrill*, 615 F. Supp. at 1027-28. These findings support the district court's conclusion that the drilling vessel qualification applies to the Brinkerhoff I. *Koke*, 730 F.2d at 219.

#### (ii) Applying the Choice of Law Factors

The applicability of the Jones Act to the claim for the death of the American seaman was not disputed. Accordingly, the district

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June 1979-Sept. 1979	South China Sea
Sept. 1979-Nov. 1979	Singapore Harbor
Nov. 1979-April 1981	Java Sea
April 1981-June 1981	Malacca Straits
June 1981	To Singapore Harbor for ten days of repairs
June 1981-Feb. 1983	Java Sea

The airplane crash out of which these cases arose occurred April 28, 1981.

court determined that the Jones Act applied to his claim. This determination is not challenged on appeal.<sup>6</sup>

In determining whether the Jones Act applies to the claims of the foreign seamen, the district court focused on the factors which receive greater weight in the drilling rig context. These factors point toward the application of foreign law to these claims. The place of the alleged wrongful act was Indonesia, the base of operations was Indonesia or, to a lesser extent, Singapore, and the employment contracts or other hiring arrangements were made in foreign locations. Moreover, the allegiance of the injured foreign seamen is foreign and a foreign forum is accessible to them. While other factors point toward application of American law (the law of the flag, the allegiance of the defendant shipowner, the corporate headquarters of the defendant shipowner, and the law of the forum), these factors are of lesser importance in a choice of law analysis where the vessel is a drilling rig as opposed to a typical blue-water vessel plying international waters. *Koke*, 730 F.2d at 219-20; *Phillips*, 632 F.2d at 86-88. The district court concluded that foreign law, not American law, applies to the claims of the foreign seamen. We agree.

### 3. Forum Non Conveniens Analysis

Having determined that foreign law applies to the claims of the foreign seamen, and it having been conceded that American law applies to the claim on behalf of the deceased American seaman, we now consider whether the district court erred in dismissing all of the claims for *forum non conveniens*. We consider separately the claims of the foreign seamen and the claim on behalf of the deceased American seaman.

#### a. The Foreign Seamen

##### i. Availability of an Alternative Forum

At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative

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<sup>6</sup> That all the claims in this case arise out of one occurrence does not require the application of uniform law to the claims of plaintiffs of differing nationalities. *In re Ocean Ranger Sinking Off Newfoundland on February 15, 1982*, 589 F. Supp. 302, 320 and n.21 (E.D. La. 1984).

forum. Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. [*Gulf Oil Corp. v. Gilbert*, 330 U.S. [501,] 506-507 [(1947)]]. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute. (citation omitted).

*Piper*, 454 U.S. at 254, n.22.

The defendants bear the burden of proving the existence of an adequate alternative forum. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir.), *cert. denied sub nom. Lui Su Nai-Chao v. Boeing Co.*, 464 U.S. 1017 (1983). They carried this burden. As to Singapore, the defendants submitted affidavits and declarations which showed that the courts of Singapore have jurisdiction over parties submitting to their jurisdiction, which submission may be by consent; that the defendants may waive the statute of limitations; that discovery of documents and interrogatories are available, but depositions are allowed only in certain circumstances; that witnesses may be subpoenaed within Singapore; that Singapore permits third party indemnity claims; that Singapore has adopted English common law with respect to claims for personal injury and English law generally with respect to air transport cases, and has a wrongful death statute.

As to Indonesia, the defendants' affidavits and declarations established that Indonesian and foreign parties may submit to the jurisdiction of Indonesian courts by written consent; that under the Indonesian Civil Code, defendants may waive the statute of limitations; that the court can compel the attendance of witnesses; and that third party indemnity claims are permitted. These affidavits and declarations further showed that Indonesian courts would apply Indonesian law, and remedies would be available to the injured seamen and their survivors under Indonesia's Workmen's Compensation Law, under the Indonesian Civil Code for Negligence, under the Indonesian Carriage by Air Act, and under the Warsaw Convention.

The affidavits which the plaintiffs filed in the district court were insufficient to counter significantly the affidavits and declarations filed on behalf of the defendants. The plaintiffs, however, have now submitted supplemental affidavits which they ask us to consider for the first time on appeal. They contend these supplemental affidavits show that neither Singapore nor Indonesia is a satisfactory alternative forum. Normally, we will not permit the record on appeal to be supplemented with evidence not presented to the district court. *Karmun v. Commissioner*, 749 F.2d 567, 570 (9th Cir. 1984), *cert. denied*, 106 S.Ct. 66 (1985). See Fed. R. App. P. 10(a); Ninth Circuit Rules 4(a), 4(b) and 13(a)(1). However, even if we were to consider the plaintiffs' proffered affidavits, we would still agree with the district court that the defendants have established that Singapore and Indonesia are satisfactory alternative fora.<sup>7</sup> Such alternative fora may not provide all of the remedies and benefits which might be available in an American court, but the remedies provided are not "so clearly inadequate or unsatisfactory that [there] is no remedy at all." *Piper*, 454 U.S. at 254. The plaintiffs' "potential damages award may be smaller, [but] there is no danger that they will be deprived of any remedy or treated unfairly." *Id.* at 255. Accordingly, we conclude that a satisfactory alternative forum exists for the resolution of these claims of the foreign seamen.

## ii. Private and Public Interest Factors

We have determined that foreign law is applicable to the claims of the foreign seamen, and that satisfactory alternative fora exist for the resolution of these claims. We now consider, and balance, the private interest and public interest factors described by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). We listed these factors in *Pereira*:

The private interest factors include: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses, and cost of obtaining attendance of willing witnesses; (3) possibility of

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<sup>7</sup> The defendants request that sanctions be imposed against the plaintiffs for attempting to submit supplemental affidavits on appeal. The request is denied.

viewing subject premises; (4) all other factors that render trial of the case expeditious and inexpensive. (citation omitted).

The public interest factors include: (1) administrative difficulties flowing from court congestion; (2) imposition of jury duty on the people of a community that has no relation to the litigation; (3) local interest in having localized controversies decided at home; (4) the interest in having a diversity case tried in a forum familiar with the law that governs the action; (5) the avoidance of unnecessary problems in conflicts of law. (citation omitted).

*Pereira* at 690.

#### (a) The Private Interest Factors

In applying the private interest factors to the foreign seamen's claims, the district court noted that access to the sources of proof clearly pointed to trial in Singapore or Indonesia. Most of the evidence and witnesses are located at or near the crash site in Indonesia or the airport in Singapore where the airplane was serviced and prepared for take-off.<sup>8</sup> The district court further noted that none of the evidence or witnesses was located in California, and that none of the material witnesses was subject to compulsory process in the district court, whereas many were located in Indonesia and Singapore and would be subject to process in those courts. Although plaintiffs have agreed to stipulate that they will pay all the costs of bringing these witnesses to the United States, they cannot assure that the witnesses will be willing to make this journey. The district court also noted that it may not be able to acquire personal jurisdiction over potential third-party defendants such as Airfast and the government of Indonesia. The district court concluded that the balance of the private interest factors tips in favor of dismissing, for *forum non conveniens*, the foreign seamen's lawsuits. We agree. -

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<sup>8</sup> Plaintiffs argue that a localized liability inquiry is not necessary because the cause of the crash was established as pilot error. Defendants have not admitted that pilot error was the sole cause of the plane crash, and suggest that some fault is attributable to Indonesian air traffic controllers.

(b) The Public Interest Factors

In its consideration of the public interest factors, the district court found that the foreign seamen's lawsuits lacked a significant connection with the district court forum; that California had no interest in the actions; that the lawsuits would impose a burden on the district court's docket and would impede the ability of local litigants to get their cases to trial; that it would be a burden to the people of the community to have to sit as jurors on the cases; and that the application of foreign law in a foreign forum would not be inconsistent with the convenience of the foreign seamen. These findings weigh in favor of dismissal of the claims.

We conclude that the district court did not abuse its discretion in dismissing the foreign seamen's lawsuits for *forum non conveniens*, subject to the conditions which the district court imposed. See *Pereira*, 764 F.2d at 690 (approving similar conditions); *Koke*, 730 F.2d at 214 (same); *In re Ocean Ranger*, 589 F. Supp. at 323 (same).

b. The American Seaman's Claim

Were we to apply a *forum non conveniens* analysis to the claim on behalf of the deceased American seaman, we might well conclude that his claim should also be dismissed. There are, after all, the same alternative fora available for resolution of his claim. The remedies are not as attractive as the remedy under the Jones Act, but notwithstanding this disadvantage, there still is a remedy. See *Piper*, 454 U.S. at 249 and 254. And, if we were to consider the private and public interest factors, we might conclude that they favor dismissal of the American seaman's case. The fact that this claim has been filed in an American court on behalf of an American is a factor which points toward retention of the American seaman's case. See *Piper*, 454 U.S. at 255-56 ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient"). But this factor is not decisive. *Id.*, n.23. What is decisive, however, and what distinguishes the American seaman's claim from the claims of the foreign seamen, is the concession of the parties and the conclusion of the district court that the Jones Act applies to the claim for the deceased American. The Fifth, Tenth and Eleventh Circuits (in cases involving

claims by or on behalf of foreign seamen) have all held that if the Jones Act applies to a seaman's claim, dismissal for *forum non conveniens* is precluded. See *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 293 (5th Cir. 1984) ("this Court has held that if American law [i.e., the Jones Act] applies, a federal court should retain jurisdiction." (citation omitted)); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983) ("if American law [i.e., the Jones Act] is applicable to the case, the *forum non conveniens* doctrine is inapplicable." (citation omitted)); *Szumlicz v. Norwegian American Lines, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983) ("if United States law [i.e., the Jones Act] applies, the case should not be dismissed for *forum non conveniens*.").<sup>9</sup>

Only the Second Circuit has taken a different view. See *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47, 48 (2nd Cir. 1983) (per curiam). Until this decision, "[i]t had been axiomatic . . . that if the Jones Act applied under *Rhoditis*, an American court could not decline to hear the case." Edelman, *Forum non Conveniens; Its Application in Admiralty Law*, 15 J. of Maritime Law and Commerce 517, 529. Although *Cruz* has recently been cited by the Second Circuit as standing for the proposition that "the *forum non conveniens* doctrine is applicable in Jones Act cases," *Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 130 (2nd Cir. 1987) (a fraud and civil RICO action) it has been suggested that statements to this effect in *Cruz* are dicta because in *Cruz* American law did not apply to the injured seaman's claim. See

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<sup>9</sup> The Fifth Circuit has recently signaled its departure from this position. *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1163 n.25 (5th Cir. 1987). In footnote 25 of *Air Crash*, a divided en banc panel of the Fifth Circuit, with Judges Garza, Johnson, Garwood, and Higginbotham not joining in the footnote, stated that in view of the Supreme Court's opinion in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and the district court's analysis in the present case, *Sherrill v. Brinkerhoff Maritime Drilling*, 615 F.Supp. 1021, 1034-35 (N.D. Cal. 1985), it disapproved and overruled all of its Jones Act case law in which it had previously held that if the Jones Act applied to a case, then the case should not be dismissed for *forum non conveniens*. *Air Crash*, 821 F.2d at 1163 n.25. *Air Crash* was not a Jones Act case.

Edelman, 15 J. of Maritime Law and Commerce 517, 530 (1984), reporting comments by Professor Y. N. Yiannopoulos, W. R. Irby Professor of Law at Tulane Law School. This suggestion appears to have merit. The injured seaman in *Cruz* was Filipino. He was injured while aboard a vessel which was passing through American waters. At the time of the injury, the vessel was moored in the Port of Camden, New Jersey. The owners and crew were all Philippine citizens, except one officer who was a U.S. citizen permanently residing in the Philippines. The vessel flew the Philippine flag. The defendant's principal base of operations was the Philippines. Considering all of these factors, the district court concluded that the Jones Act did not apply, and dismissed the case for *forum non conveniens*. *Cruz v. Maritime Co. of Philippines*, 549 F. Supp. 285 (S.D.N.Y. 1982), *aff'd* 702 F.2d 47 (2nd Cir. 1983). The Second Circuit did not address the question whether the Jones Act applied. Instead, in affirming the district court's dismissal, it stated that a choice of law analysis is not appropriate in a Jones Act case. 702 F.2d at 48. However, if the Jones Act did not apply to the case, as the facts suggested and the district court concluded, then this comment does indeed appear to be dictum.

In any event, however, we find the decisions of the Fifth, Tenth and Eleventh Circuits which preclude dismissal of a Jones Act case for *forum non conveniens* to be persuasive. This view is buttressed by decisions of the Supreme Court in which the Court has commented upon the unavailability of *forum non conveniens* as a basis for dismissal of cases filed under the Federal Employers' Liability Act (FELA). In *Gilbert*, the Court stated: "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*." 330 U.S. at 505. The Court in *Gilbert* cited *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 (1941) for this proposition. In *Kepner*, the Court stated that the "privilege of venue, granted by the legislative body which created this right of action [under the FELA], cannot be frustrated for reasons of convenience or expense." 314 U.S. at 54. The Jones

Act incorporates the FELA, 46 U.S.C. § 688(a),<sup>10</sup> and both the Jones Act and the FELA have specific venue provisions. The FELA provides in relevant part:

Under this chapter an action may be brought in a district court of the United States, in the district court of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing the action.

45 U.S.C. § 56.

The portion of the Jones Act which pertains to jurisdiction and venue provides:

Jurisdiction in [actions under the Jones Act] shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. § 688(a).

In view of the Supreme Court's comments as to the unavailability of the *forum non conveniens* doctrine in FELA cases, the degree of similarity between the specific venue provisions under the Jones Act and under the FELA, and the incorporation of the FELA into the Jones Act, we believe that the *forum non conveniens* doctrine should be unavailable as a ground for dismissal under the Jones Act as it is under the FELA. (*Cf. La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310, n.10 (11th Cir. 1983) (suggesting that Congress implicitly spoke to, and rejected, the *forum non conveniens* doctrine in both FELA and Jones Act cases); and see *Dalla v. Atlas Maritime Co.*, 562 F. Supp. 752, 757 (C.D. Cal. 1983) ("[W]hen a seaman has a cause of action based on American law, he comes by right into American courts."), *aff'd* 771 F.2d 1277 (9th Cir. 1985). Finally, we see no

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<sup>10</sup> Section 688(a) of the Jones Act provides in relevant part: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." 46 U.S.C. § 688(a).

reason to depart from the clear weight of authority in those circuits which have considered this question. We hold that when the Jones Act applies to a seaman's claim, that claim may not be dismissed on the ground of *forum non conveniens*.

### C. The Injunction

When the district court dismissed the plaintiffs' lawsuits for *forum non conveniens*, the plaintiffs who did not settle their claims reactivated lawsuits they had previously filed in the Texas state court. In response to this, the district court enjoined the plaintiffs and their attorneys from "filing and/or prosecuting actions in the state courts of Texas or any other court in the United States . . . arising out of the air crash on April 28, 1981. . . ." We review the grant of this injunction for abuse of discretion. *Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425, 1426 (9th Cir. 1986).

The Anti-Injunction Act provides that:

A court of the United States may not grant an injunction to stay proceedings in a state court except [1] as expressly authorized by act of Congress or [2] where necessary in aid of its jurisdiction or [3] to protect or effectuate its judgment.

28 U.S.C. § 2283.

This court strictly construes these three exceptions to the Anti-Injunction Act. *Alton Box Board Co. v. Espirit de Corp.*, 682 F.2d 1267, 1271 (9th Cir. 1982).

The first exception to the Anti-Injunction Act does not apply here, because there is no express statutory authorization for an injunction in this situation. The second exception applies to the American seaman's lawsuit, because, under our holding in this case, the district court will retain jurisdiction over that lawsuit. *See Alton Box*, 682 F.2d at 1271. This exception does not apply, however, to the foreign seamen's lawsuits because the district court no longer has jurisdiction over those suits. *Id.* The district court held that jurisdiction was more properly in a foreign forum and dismissed the foreign seamen's cases. At that point there was no need for an injunction to protect the district court's jurisdiction. *Id.*

The third exception to the Anti-Injunction Act similarly does not support the district court's injunction. This court has held that a district court may grant an injunction to protect the *res judicata* effect of its judgment "where a federal litigant has prevailed on the merits, yet is threatened with burdensome and repetitious relitigation of the same issues in a multiplicity of actions." *Golden*, 786 F.2d at 1427. Defendants argue that a determination on the merits is not required for an injunction against state court actions when a district court has dismissed a lawsuit for *forum non conveniens* arising in the same matters. The wording of our cases, however, is explicit, and refers to decisions on the merits. See *Golden*, 786 F.2d at 1427; *Midkiff v. Tom*, 725 F.2d 502, 504 (9th Cir. 1984). Here, defendants have prevailed on a procedural point pertaining to the propriety of the prosecution of the foreign seamen's lawsuits in a United States district court. No judgment on the merits has been rendered. The grant of the injunction against the foreign seamen prosecuting their lawsuits in state court violated the Anti-Injunction Act and was an abuse of discretion.

The recent Fifth Circuit case of *Exxon Corporation v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987) is inapposite. In *Exxon*, the surviving wife of a seaman who had been injured and died on board ship in Singapore, brought suit in the federal district court in Houston, Texas. The district court granted the defendants' motion for summary judgment "as to Plaintiffs' claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers Compensation Act, and the general maritime laws of the United States." *Exxon*, 817 F.2d at 310 n.4 (emphasis in original). Having thus disposed of these claims on the merits, the court nonetheless granted the defendants' motion to dismiss "under the doctrine of *forum non conveniens*, . . . without prejudice," and subject to conditions which permitted the plaintiff to refile her suit in Singapore. *Id.*

The judgment permanently enjoined the plaintiff from prosecuting any action against the defendants in the courts of Texas or any other state, arising out of or related to the death of the plaintiff's husband on board ship in Singapore. The plaintiff did not appeal this judgment and it became final. She then attempted

to pursue, against the defendants in the state court in Houston, Texas, the same claims she had filed against them in the federal district court in Houston. The defendants filed a new suit in federal court in Houston to enjoin the state proceeding. The district court granted a permanent injunction enjoining the state proceeding and sanctioned the plaintiff's attorneys for pursuing it.

The Fifth Circuit, with one member of the three-judge panel concurring and one dissenting, affirmed the judgment of the district court. What established the opinion as a majority opinion was the concurrence of Judge Clark. He pointed out that the plaintiff was simply bound by the earlier judgment which enjoined her from relitigating the case in state court; he did not concur in Judge Gee's *forum non conveniens* analysis. *Exxon*, therefore, is not a majority opinion on *forum non conveniens* and hence is not in conflict with our unanimous opinion in this case.

## CONCLUSION

The district court did not abuse its discretion in reconsidering the earlier denial of the defendants' *forum non conveniens* motions. The district court correctly determined that foreign law applies to the claims of the foreign seamen, and it did not abuse its discretion in dismissing the foreign seamen's lawsuits for *forum non conveniens*. The district court did abuse its discretion in dismissing the lawsuit on behalf of the deceased American seaman, because the Jones Act applies to this claim. *Nickol*, 743 F.2d 289; *Needham*, 719 F.2d 1481; *Szumlicz*, 698 F.2d 1192.

The injunction enjoining the foreign seamen from prosecuting their claims in state court is precluded by the Anti-Injunction Act. Accordingly, that portion of the injunction is vacated. Since the district court will be retaining the lawsuit filed on behalf of the deceased American seaman, however, that portion of the injunction enjoining the prosecution of the lawsuit on his behalf in any other court in the United States is appropriate but is modified to except prosecution in the United States District Court for the Northern District of California. The portion of the judgment granting the permanent injunction as to the claim for the deceased American seaman is affirmed as modified.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, MODIFIED AND REMANDED.



APPENDIX C  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

No. C-82-0836 RPA

And Related Actions:

C-82-1866 RPA C-82-2565 RPA C-82-2566 RPA  
C-82-2568 RPA C-82-2569 RPA C-83-0604 RPA  
C-83-0605 RPA C-83-0606 RPA C-83-0607 RPA  
C-83-1022 RPA C-83-4025 RPA

CORA E. SHERRILL, etc.,  
Plaintiffs,

vs.

BRINKERHOFF MARITIME DRILLING CORPORATION, et al.,  
Defendants.

ORDER

This matter came on for hearing on defendants' Motion for Issuance of Formal Findings of Fact and Clarification of Stay Order. The Court has received and considered the documents filed by the parties, has heard oral argument, and has considered all supplemental papers submitted.

The Court grants defendants' motion, so this matter may be heard on appeal by the Ninth Circuit Court of Appeals, and issues the following findings in connection with the choice of law question. In doing so, the Court follows the suggestion in the Ninth Circuit Court of Appeals' Order of June 20, 1984 to make (a) a definitive finding as to the shipowner's base of operations and (b) a finding regarding the place where contracts of employment were entered into.

In making these findings, the Court has construed the papers in the light most favorable to the plaintiffs, the non-moving parties,

both here and in the underlying motions. The Court believes that it would be the most expedient course if the Court of Appeals were to decide the choice of law issue before this action proceeds.

The Court sets forth findings as to choice of law pursuant to those stated in the leading case of *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed.1254 (1953) and one in a later case, referred to by the Court of Appeals, *Hellenic Lines v. Rhoditis*, 398 U.S. 306, *reh. denied*, 400 U.S. 856 (1970).

In some instances the Court merely reiterates as formal findings of fact points made in its prior Opinion and Order, which contains more discussion. To that extent, these findings are to be read in conjunction with the Court's previous Opinion and Order dated October 11, 1983.

### FINDINGS OF FACT

1. The place of the wrongful act was Indonesia.
2. The law of the flag is the law of the United States.
3. The allegiances or domiciles of the injured parties are as follows. Three plaintiffs (or plaintiff's decedent), Sherrill, Schwartz, and Craig, are American. The remaining seven plaintiffs, Cole, Lowry, Jones, Chee, Albuquerque, Zipfel, and Grunke, are foreign, with a variety of countries represented. Most of the foreign plaintiffs are English-speaking citizens or domiciliaries of Canada, Australia, the United Kingdom and New Zealand; only two are citizens of Singapore, and none are Indonesian.
4. The allegiance of the defendant shipowner is the United States.
5. The place where the contracts of plaintiffs' employment were made was previously an unresolved issue. Defense counsel represented to the Court at the hearing that as to those plaintiffs who did enter into formal contracts of employment, they were entered into in foreign locales. The Court has previously implicitly found that any contracts were entered into in foreign locations, and now formally so finds.

6. Foreign forums in either Singapore or Indonesia are accessible to the plaintiffs.

7. The law of the forum is American.

8. The shipowner's base of operations is a matter which this Court previously declined to fix since it decided that substantial contacts with the United States were already present. The Court assumed a foreign base of operations, *see e.g., Vaz Borralho v. Keydrill Co.*, 696 F.2d 379, 383, n.4 (5th Cir. 1983). Even assuming a foreign base of operations, the Court previously decided that application of American law was nevertheless warranted in these proceedings.

The Court now finds that the relevant base of operations of the vessel Brinkerhoff I was either Singapore or Indonesia, or both. The overall base of operations of the corporate shipowner defendant, Brinkerhoff Maritime Drilling Corporation, was in San Francisco, California.

All proceedings are stayed pending the Court of Appeals' resolution of defendants' interlocutory appeal.

IT IS SO ORDERED.

DATED: October 22, 1984

ROBERT P. AGUILAR  
Robert P. Aguilar  
United States District Judge



APPENDIX D

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

No. C-82-0836-WWS

CORA E. SHERRILL, Individually and as Administratrix of the  
Estate of Max O. Sherrill, deceased,

Plaintiff

v.

BRINKERHOFF MARITIME DRILLING, a corporation, et al.,  
Defendants.

No. C-82-2565-WWS

TIMOTHY P. JONES,

Plaintiff,

v.

BRINKERHOFF MARITIME DRILLING, a corporation, et al.,  
Defendants.

No. C-82-2566-WWS

DAVID ALFRED LOWRY,

Plaintiff,

v.

BRINKERHOFF MARITIME DRILLING, a corporation, et al.,  
Defendants.

D-2

No. C-82-2568-WWS

DAVID S. SCHWARTZ, as Adminstratrix of the Estate of James  
C. Owen,

Plaintiff,

v.

BRINKERHOFF MARITIME DRILLING, a corporation, et al.,  
Defendants.

No. C-82-2569-WWS

MURRAY ROBERT COLE,

Plaintiff,

v.

BRINKERHOFF MARITIME DRILLING, a corporation, et al.,  
Defendants.

No. C-83-0603-WWS

SHEREEN RAMONA ZIPFEL, Individually and as Adminstratrix  
of the Estate of Ian Charles Zipfel, deceased,

Plaintiff,

v.

HALLIBURTON CO., et al.,

Defendants.

No. C-83-0604-WWS

TEN FONG CRAIG, Individually and as Adminstratrix of the  
Estate of William Henry Craig, deceased,

Plaintiff,

v.

ATLANTIC RICHFIELD CO., et al.,

Defendants.

D-3

No. C-83-0605-WWS

CHAN LUCK CHEE,

Plaintiff,

v.

McCLELLAND ENGINEERS, INC., et al.,  
Defendants.

No. C-83-0606-WWS

PATRICK PAUL GRUNKE,

Plaintiff,

v.

ATLANTIC RICHFIELD Co., et al.,  
Defendants.

No. C-83-0607-WWS

VYNER GERARD ALBUQUERQUE,  
Plaintiff,

v.

OCEANEERING INTERNATIONAL, INC., et al.,  
Defendants.

No. C-83-1022-WWS

MICHAEL WAYNE CRAIG,

Plaintiff,

v.

BRINKERHOFF MARITIME DRILLING, et al.,  
Defendants.

MEMORANDUM OF OPINION  
AND ORDER

Before the Court are eleven actions brought by or on behalf of seamen who were killed or injured in an air crash in Indonesia. These actions were related pursuant to Local Rule 205-2 for

assignment to a single judge; they have, however, not been consolidated. Pursuant to the court's assignment plan they were later reassigned from that judge to the undersigned.

Prior to the reassignment, defendants filed motions to dismiss for forum non conveniens. The motions were denied by another judge of this court. Following reassignment, defendants renewed their motions. The Court granted those motions by order of June 10, 1985, but on reconsideration vacated its order on July 25, 1985. The motions are now before the Court for renewed consideration and decision.

## I

### FACTS

The facts material to the disposition of these motions are undisputed and are briefly summarized below.

On April 28, 1981, an aircraft operated by P.T. Airfast Services ("Airfast"), an Indonesian corporation, crashed on approach for landing at Simpang Tiga Airport, Pekanbaru, North Sumatra, Indonesia. The aircraft had been chartered by Hudbay Oil (Malacca Strait) Limited ("Hudbay") to transport employees of Brinkerhoff Maritime Drilling Corporation ("BMD") between Singapore and Pekanbaru, Sumatra. From the airport at Pekanbaru, the passengers were to be transported by helicopter to the drilling barge Brinkerhoff I, then operating in the Straits of Malacca in Indonesian waters.

The Brinkerhoff I is an American flag drilling barge, registered in San Francisco, California, owned by BMD, a Delaware corporation with its home base in San Francisco. In October 1979, BMD entered into a Day-Work Drilling Contract with Atlantic Richfield Indonesia, Inc., ("ARII"), negotiated in Indonesia. Pursuant to this contract, BMD agreed to furnish and operate the Brinkerhoff I in areas of operations designated by ARII. In February, 1981, ARII directed BMD to move the barge to a lease concession operated by Hudbay. ARII and Hudbay executed an agreement for use of the barge in March, 1981, governing the drilling services to be performed by her on Hudbay's lease

concession. Essentially, that agreement provided that BMD would perform drilling operations for Huidbay as instructed by ARII.

The crew of the Brinkerhoff I lived on board the vessel and rotated their time on and time off in two-week increments. They were shuttled between Indonesia and Singapore in the Airfast aircraft chartered by Huidbay under its contract with ARII. The crash occurred as members of the crew were returning to Indonesia enroute to the drilling barge. At the time of the crash, the aircraft was in contact with Indonesian air traffic controllers at Simpang Tiga Airport. Indonesian authorities subsequently investigated the crash and issued a report attributing it to pilot error and weather conditions. The crew and five of the thirteen passengers on the plane died in the crash; others were injured.

These actions are brought by or on behalf of ten of the passengers, all of whom were employed on the Brinkerhoff I at the time. All are brought under the Jones Act, 46 U.S.C. § 688, and most also allege claims under general maritime and California common law.

Four of the actions are brought on behalf of three American seamen:

C-82-0836: brought on behalf of Max Sherill, a United States citizen and resident of New Mexico at the time of his death in the accident, by the administratrix of his estate, also a United States citizen and resident of New Mexico.

C-82-2568: brought on behalf of James Owen, a United States citizen and resident of Minnesota at the time of his death in the accident, by the administratrix of his estate.

C-83-0604: brought on behalf of Wm. Henry Craig, a United States citizen and resident of California at the time of his death in the accident, by Ten Fong Craig, as administratrix of his estate.

C-83-1022: brought on behalf of Wm. Henry Craig, by his executor and heirs, United States citizens and residents of California.

The remaining actions are all brought by or on behalf of seamen none of whom was a citizen or resident of the United States:

C-82-2565: brought by Timothy Peter Jones, a British subject residing in Britain.

C-82-2566: brought by David Lowry, a citizen of Canada residing in Canada or Singapore.

C-82-2569: brought by Murray Robert Cole, a citizen of New Zealand residing in the Philippines.

C-83-0603: brought by Shereen Zipfel, a citizen of Singapore, as administratrix of the estate of Ian Charles Zipfel, a British subject then residing in Britain or Singapore.

C-83-0605: brought by Chan Chuck Lee, a citizen and resident of Singapore.

C-83-0606: brought by Patrick Paul Grunke, a citizen and resident of Australia.

C-83-0607: brought by Vyner Gerard Albuquerque, a citizen and resident of Singapore.

## II

### RECONSIDERATION

The threshold question confronting the Court is whether to reconsider the prior denial of the motions by another judge. Plaintiffs argue that the denial is the law of the case and bars reconsideration. The Court is mindful of the institutional and policy considerations militating against reconsideration of an earlier ruling by a judge of the same court. As a rule "the various judges who sit in the same court should not attempt to overrule the decisions of each other. . . ." *Castner v. First National Bank of Anchorage*, 278 F.2d 376, 379 (9th Cir. 1960) (citing *Shreve v. Cheesman*, 69 F. 785, 791 (8th Cir. 1895)). This rule is premised upon principles of comity and uniformity, and the need to preserve the orderly functioning of the judicial process. *Castner, supra*, 278 F.2d at 379-380. But it does not raise an absolute bar to reexamining questions previously determined. It is well estab-

lished in this circuit that one district judge in a multi-judge court may modify or overrule an interlocutory order of another judge sitting in the same case for "cogent reasons" or where "exceptional circumstances" are presented. *Greyhound Computer Corp. v. IBM*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *United States v. Desert Gold Mining Co.*, 433 F.2d 713 (9th Cir. 1970); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804 (9th Cir.), *cert. denied*, 375 U.S. 821 (1963); *Castner, supra*. Thus it makes no difference whether the interlocutory order is reconsidered by the same judge or by a different judge to whom the case has been reassigned. *United States v. Desert Gold Mining Co.*, 433 F.2d 713, 715 (9th Cir. 1970).

In the prior order denying the motions, filed October 14, 1983, the court stated the issue to be "whether [it] should retain these cases and try them under the Jones Act, or whether plaintiffs should be remitted to appropriate proceedings elsewhere." (Order p. 4) It then analyzed and discussed at some length the issue whether plaintiffs could maintain a claim under the Jones Act. The court concluded that "American law [applies] to all actions, and retain[ed] jurisdiction." It went on to add: "The Court does no more at this time than decide the choice-of-law question." (p. 9) The motions to dismiss for forum non conveniens were, however, denied without further discussion. By order filed January 16, 1984, the court, pursuant to 28 U.S.C. § 1292(b), certified for an interlocutory appeal only this question: "What law, United States law (i.e. the Jones Act), or foreign law, applies to this matter." After further proceedings in which the court made certain additional findings (by order filed October 29, 1984), the court of appeals denied the petition for an interlocutory appeal.

The status of these motions at this time, therefore, is that while the court denied them, a ruling from which no appeal was sought, it did not expressly decide the forum non conveniens issue. As plaintiffs themselves have said in a memorandum filed following the ruling: "While this Court did not expressly decide the *forum non conveniens* issue . . . it did deny the *forum non conveniens* motions." (Response of plaintiffs in opposition to defendants' joint motion for issuance of formal findings of fact to enable appeal to proceed, filed Sept. 5, 1984, p. 23)

Presumably the court considered itself bound by its ruling applying the Jones Act to all of these actions to deny the motions for forum non conveniens. As hereafter discussed, the Supreme Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), not considered in the prior ruling, requires reexamination of the assumption on which the court acted.

More importantly, the court made its ruling premised on the propriety of the so-called "global treatment" of all of these cases. The Ninth Circuit, however, undercut this premise in *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82, (9th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981), when it said:

But the allegiance of the injured seaman has always been viewed as a relevant and important consideration in determining the appropriate law to apply.

*We know of no authority for the view that foreign nationals may predicate a right to have American law applied on the rights of similarly situated American citizens.* The suggestion that one follows from another is another "variety of social jingoism, which presumes that the 'liberal purposes' of American law must be exported to wherever our multinational corporations are permitted to do business." (Emphasis added)

Cogent reasons therefore exist for reconsideration of the prior ruling.

### III CHOICE OF LAW

All plaintiffs bring their actions pursuant to the Jones Act, which states in part that "[a]ny seaman who shall suffer personal injury in the course of his employment, may . . . maintain an action for damages at law, . . . ." 46 U.S.C. § 688. The Act applies to the death or injury of seamen occurring while being transported by their employer to or from the vessel. See e.g., *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422, 433 (5th Cir. 1977) (Jones Act applied to seaman killed in crash of helicopter ferrying him from drilling rig). For purposes of these motions, the

Court assumes that plaintiffs or their decedents were seamen for Jones Act purposes.

The choice of law rule which governs application of the Act was laid down in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970). The Court there identified the eight factors controlling the determination whether the Act applies: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured party; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations.<sup>1</sup>

*Lauritzen* requires courts in applying these factors to compare the substantiality of this country's interest in a given action with that of other nations. Conflicts between competing laws are resolved by "ascertaining and valuing [the enumerated] points of contact between the transaction and the states or governments whose competing laws are involved." 345 U.S. at 582. *Rhoditis* emphasized that application of the *Lauritzen* factors is not mechanical, but requires courts carefully to review and weigh each factor "in light of the national interest served by assertion of the Jones Act jurisdiction." 398 U.S. at 309.

*Lauritzen* and *Rhoditis* contemplated ocean-going vessels generally, true maritime vessels that ply the seas as an integral part of the shipping industry. As to these vessels, Gilmore and Black state:

American law will . . . be applied in actions brought on account of injuries suffered on American-flag ships, whether the plaintiffs are American or foreign, resident or non-resident, seamen, harbor-workers, passengers, guests or, for that matter, pirates. By taking out registry in this country, the shipowner consents in effect to the application of the law

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<sup>1</sup> *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), extended the principles enunciated in *Lauritzen* to cases involving general maritime law.

of the United States. This proposition has seemed so self-evident that it appears never to have been questioned.

G. Gilmore & C. Black, *The Law of Admiralty* at 477 (2d ed. 1975).

If the *Brinkerhoff I* were a traditional ocean-going vessel, so that the place of injury of any particular seaman would be fortuitous, the law of the flag would be of paramount importance. The rationale for this result rests "on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns [the ship]." *Lauritzen*, 345 U.S. at 585. For the same reason, the allegiance of the shipowner and the shipowner's corporate base of operations are also significant factors under *Lauritzen* and *Rhoditis*. Defendants concede that if these factors were controlling, American law should be applied to all these actions.

The relative value attached to these factors has undergone change, however, as they have come to be applied to drilling rigs. Such vessels differ from traditional ocean-going vessels in that they move comparatively infrequently and only over short distances. As a result the element of fortuity in the place where an accident occurs has been largely eliminated. *Phillips v. Amoco Trinidad Oil Co.*, *supra*, 632 F.2d at 87; *Koke v. Phillips Petroleum Co.*, 730 F.2d 211 (5th Cir. 1984); *Bailey v. Dolphin International, Inc.*, 697 F.2d 1268 (5th Cir. 1983); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir. 1983); *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir.) *reh'g denied*, 659 F.2d 1075 (5th Cir. 1982), *cert. denied*, 455 U.S. 1019 (1982); *Zekic v. Reading & Bates Drilling Co.*, 536 F. Supp. 23 (E.D. La. 1981), *modified* 680 F.2d 1107 (5th Cir. 1982). In drilling rig cases, therefore, the place of the wrong, the domicile of the injured person and the place where the contract was made take on greater significance than other factors. *Phillips*, 632 F.2d at 87. For the same reason, the corporate base of operations is considered of less significance than the base of day-to-day operations. *Koke v. Phillips Petroleum Co.*, 730 F.2d at 220; *Vaz Borralho v. Keydril Co.*, 696 F.2d at 389.

Plaintiffs argue that the Brinkerhoff I is more akin to a traditional blue water vessel than a fixed drilling rig, noting that she moves from drilling site to drilling site in various Far Eastern Seas.<sup>2</sup> In its order of October 11, 1983, the court observed that the Brinkerhoff I "appears to have been a stationary vessel rather than one that travelled the international seas," but nonetheless considered the law of the flag a substantial factor.<sup>3</sup> The undisputed facts show that the Brinkerhoff I did not move under her

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<sup>2</sup> Plaintiffs also argue that the Ninth Circuit's order of June 21, 1984, denying interlocutory review, indicates that the Ninth Circuit considered the Brinkerhoff I as a traditional vessel rather than a drilling rig. The Ninth Circuit stated in part:

[W]e do not have an adequate record for review. We note, for example, the lack of a finding on the question of the shipowner's base of operations, and the lack of clear evidence on the places where the contracts of employment may have been made. See generally *Hellenic Lines v. Rhoditis*, 389 U.S. 306, 308-09 (1970). If the district court and the parties create a better record for review before the proceedings have continued so far as to discourage interlocutory action, we see no reason why the defendants may not request a certification for interlocutory appeal from the district court again.

This clearly was not a ruling on the vessel's status.

<sup>3</sup> In its order of October 22, 1984, the court made the following additional findings of fact, without analysis, however, of their significance to the choice of law in these cases:

1. The place of the wrongful act is Indonesia.
2. The law of the flag is the United States.
3. The allegiance or domiciles of the injured parties are as follows: three of the plaintiffs are United States citizens. Of the remaining seven plaintiffs, two are citizens of Singapore and the others are domiciliaries of Canada, Australia, the United Kingdom and New Zealand.
4. The allegiance of the defendant shipowner is the United States.
5. The employment contracts were entered into "in foreign locations."
6. Foreign forums in either Singapore or Indonesia are accessible to the plaintiffs.
7. The law of the forum is American.

own power, having to be towed by other vessels, and is described in the Certificate of Registry as a "barge." Although she was moved to various drilling locations in Indonesian and other South East Asian waters, she was not in any sense a traditional maritime vessel "plying the seas as an integral part of the shipping industry." *Chiazor, supra*, 648 F.2d at 1018. The drilling rig analysis applies to drilling vessels that remain stationary or move only infrequently and over short distances. *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 297 (5th Cir. 1984). Between 1979 and February, 1983, the Brinkerhoff I operated at the following locations:

June 1979-Sept. 1979	—	South China Sea
Sept. 1979-Nov. 1979	—	Singapore Harbor
Nov. 1979-April 1981	—	Java Sea
April 1981-June 1981	—	Malacca Straits
June 1981	—	to Singapore Harbor for ten days of repairs
June 1981-Feb. 1983	—	Java Sea

This record shows that the Brinkerhoff I, while not at a single fixed location, spent long periods of time at only a few drilling locations in the general vicinity of Indonesia.

These undisputed facts and the court's prior findings viewed in the light of *Phillips, supra*, and the other cited cases, compels the conclusion that the Brinkerhoff I was a drilling vessel for purposes of applying choice of law rules.

In its prior ruling denying the motions, the court declined to follow *Phillips* because of the "presence of American plaintiffs" and the fact that "most of the remaining plaintiffs are English-speaking." (Order of Oct. 12, 1983, p.8). *Phillips*, however, does not turn on the fact that all of the plaintiffs were Trinidad citizens. It was because of the stationary character of the operation in which plaintiffs were injured or killed that the court of appeals gave controlling weight to the place of the wrongful act, the

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8. The relevant base of operations of the vessel Brinkerhoff I was either Singapore or Indonesia, or both. The overall base of the corporate shipowner defendant, BMD, was in San Francisco, California.

allegiance and domicile of the workers, the place of contract, and the base of the operations.

Nor is it relevant that all of the factors do not coincide in a single country. As the court held in *Bailey v. Dolphin International, Inc.*, *supra*, 697 F.2d at 1277-78:

It is certainly true that where the factors emphasized in *Chiazor* [and *Phillips*] all coincide in one country, the choice of law determination points strongly to the application of that country's law, but it does not follow that the application of American law is required, as if by default, when these factors are spread among several other foreign countries, and the only contact with the United States remains ultimate American ownership or control of the business ventures engaged in the drilling operation.

Further, the *Bailey* court specifically rejected the argument made by plaintiffs here that the involvement of several countries shifts greater emphasis to the place of ownership and base of operations. The court stated:

[T]he substantiality of the base of operations—factor or the law of the domicile of the ultimate owner, in an offshore drilling rig non-traditional maritime context, does not increase merely because the factors given added significance in *Chiazor* are spread among more than one foreign nation.

*Id.*

See also *Martyn v. Transworld Drilling Company Ltd.*, No. 78-3423 (E.D. La. November 29, 1979), *aff'd* 619 F.2d 82 (5th Cir. 1980) (American law not applied where Irish citizen injured on American-owned drilling platform in the North Sea off the coast of the United Kingdom); *Zekic v. Reading & Bates Drilling Co.*, *supra* (Italian, not American law, applied where Yugoslavian citizen injured in Italian territorial waters on American-owned drilling rig flying American flag.)

Finally, as *Phillips* makes clear, the mere presence of American plaintiffs is not sufficient to entitle foreign plaintiffs to have the Jones Act applied to their cases. *Phillips, supra*, 632 F.2d at 89. A closely analogous decision is *In Re Ocean Ranger Sinking Off*

*Newfoundland*, 589 F. Supp. 302 (E.D. La. 1984), involving consolidated actions arising from the sinking of the *Ocean Ranger*, an oil drilling vessel, off the coast of Newfoundland, Canada. American and Canadian crewmen died in the accident. Both the law of the flag and the "ultimate base of corporate operations" were American. The place of the wrongful act and the day-to-day base of operations were Canadian. The allegiance of the injured seamen and the place of the contract were divided between this country, as to those actions filed as a result of the deaths of American crewmen hired in America by American companies, and Canada, as to those actions filed as a result of the deaths of Canadian crewmen hired in Canada by Canadian companies. The court cautioned that this unique combination of choice of law factors mandated a result different from previous drilling rig cases. Specifically, the court concluded that American law applied to those actions filed as a result of the deaths of American crew members and Canadian law applied to those actions filed as a result of the deaths of Canadian crew members. The court explained its decision as follows:

In the actions filed as a result of Canadian deaths, all four of the factors given added significance in the drilling rig context, allegiance of the seamen, place of the wrongful act, and day-to-day base of operations, point toward application of Canadian law. These factors are not outweighed by the fact that the law of the flag and the ultimate base of operations were American, especially in the drilling rig context. In the actions filed as a result of American deaths, two of the four factors given added significance in the drilling rig context, place of the wrongful act and day-to-day base of operations, point toward the application of Canadian law and the allegiance of the seamen, point toward application of American law. However, as to the actions filed as a result of American deaths, the fact that the law of the flag and the ultimate base of corporate operations were American does tip the balance in favor of applying American law.

*Id.* at 320.

The court expressly rejected plaintiffs' argument that the *Ocean Ranger* drilling operation be viewed as a single "shipping

transaction" "requiring one catholic choice of law determination." 589 F. Supp. at 320 n.21. The court instead considered each crew member's employment as a maritime transaction for which a choice of law determination must be made. The court noted that "the appropriateness of this approach is evident from analysis of the multifactor *Lauritzen-Rhoditis* test itself, which contains two factors, allegiance of the seaman and place of the contract, that explicitly require individualized treatment." *Id.*

Plaintiffs here contend that the same choice of law should apply to all plaintiffs, whether American or foreign seamen. First, they argue that the "global solution" as to choice of law, employed by the court in *In Re Paris Aircrash of March 30, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975), applies here. Although plaintiffs there included domiciliaries of twenty-four nations, the court applied California law on damages to their consolidated claims. The case is of little relevance here, however, because the only issue in litigation was the amount of damages recoverable for a tort committed in California. The interest of California in having its damage law applied where the aircraft in suit was designed, constructed, manufactured and tested in California warranted uniform treatment of all claims.

Plaintiffs also rely on *Industrial Development Corporation v. Mitsui & Company*, 671 F.2d 876 (5th Cir. 1982) *vacated and remanded on other grounds*, 460 U.S. 1007 (1983), *rev'd and remanded*, 704 F.2d 785 (5th Cir.), *cert. denied* 104 S.Ct. 393 (1983). That case holds merely that the doctrine of forum non conveniens does not apply to actions under the Sherman Act and, even if it did, would not permit dismissal of such action on the ground that a foreign country is a more convenient forum. Moreover, the court observed, requiring the same parties to litigate two suits in different forums would not be consistent with the doctrine. Here, of course, different parties would be involved in the various actions.

Plaintiffs also argue that the Shipowners Liability (Sick and Injured) Convention of 1926, 54 Stat. 1693, guarantees "equality of treatment to all seamen [injured on the high seas] irrespective of nationality, domicile or race." 54 Stat. 1700. Plaintiffs interpret this provision to mean that American law must apply to all

foreign seamen serving on American-owned or American flag vessels. But this treaty does not give aliens access to American courts; it relates only to shipowners' liability for maintenance and cure of seamen. Norris, *The Law of the Seamen*, § 605, 150-152 (3d ed. 1979). Further, such an interpretation would render nugatory the weighing of factors mandated by *Lauritzen* and *Rhoditis*. The Fifth Circuit criticized this argument in *In Re McClelland Engineers, Inc.*, 742 F.2d 837, 839 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 1228 (1985), as "represent[ing] a candidly novel and clear departure from our holdings and those of the Supreme Court."

The Court, therefore, concludes that settled law requires it to determine the applicable law with respect to each plaintiff in light of the relevant factors as they affect that plaintiff.

The factors entitled to the greatest weight in this case point to the application of foreign law here: as to each of the seamen, the place of the alleged wrongful act was Indonesia, the base of operations was Indonesia or, to a lesser extent, Singapore, and the employment contracts or other hiring arrangements were made in foreign locations.

With respect to those plaintiffs or their decedents whose allegiance or domicile was foreign, these factors require a finding that the Jones Act does not apply to their actions.<sup>4</sup>

With respect to the four actions on behalf of three American seamen, the defendants do not dispute the applicability of the Jones Act and the Court so finds.

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<sup>4</sup> The Jones Act was amended on December 29, 1982, by Pub. L. 97-389, Title V, § 503(a), 96 Stat. 1955, adding a new subsection barring foreign seamen from maintaining certain actions under the Act or other United States maritime law. The legislation contains a "savings" clause providing that the new subsection will not apply to any actions arising out of an incident that occurred before the date of the amendment.

## IV

## FORUM NON CONVENIENS

The doctrine of *forum non conveniens* permits a court to decline to exercise its jurisdiction for prudential reasons. While the doctrine leaves much to the trial court's discretion, the principal relevant factors to be considered are well-established. They include, first, those relevant to the litigant's private interest: relative ease of access to sources of proof; availability of compulsory process for and the cost of obtaining the attendance of witnesses; possibility of a view of the premises; and other practical problems of conducting an expeditious and economical trial.

Second, there are factors bearing on the public interest: docket congestion of the court in which the action was filed; compelling jurors to serve on cases in which the community has no interest; the preference for having localized controversies decided at home; and the interest in having the action tried in the forum whose law will be applied. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-9 (1947)

Because the Court has determined that the foreign seamen are not entitled to the application of American law while the American seamen are, their cases must be separately analyzed.

## A. Foreign Seamen

## 1. Availability of an Alternative Forum

"At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum." *Piper*, 454 U.S. at 254 n.22. That the remedy in the alternative forum is less favorable to plaintiff is, under *Piper*, insufficient to warrant denial of the motion so long as it is reasonably adequate. Of course, an unfavorable change in the law may be a factor to be considered but it is not determinative unless the remedy is "clearly inadequate or unsatisfactory." *Id.* at 254. It must be considered a relatively insignificant factor, in any event, in the cases of the foreign seamen.

Defendants bear the burden of proving the existence of an adequate forum. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir. 1983). They have identified two alternative forums, Singa-

pore and Indonesia. The court in its order of October 22, 1984, found both to be "accessible to plaintiffs."

With respect to Singapore, defendants have submitted statements by Helen Yeo of the Singapore law firm of Chor Pee and Company. In substance, she states that the courts of Singapore have jurisdiction over parties submitting to their jurisdiction which, under the Supreme Court of Judicature Act, may be by consent; that defendants may waive the statute of limitations; that discovery of documents and interrogatories are available but depositions are allowed only in certain circumstances; that witnesses may be subpoenaed within Singapore, and that Singapore permits third-party indemnity claims. (Reddick Decs.) Moreover, Singapore has adopted English common law with respect to claims for personal injury and English law generally with respect to air transport cases, and has a wrongful death statute. (McCloud Dec.)

In opposition, plaintiffs first submitted a declaration by Thomas Moon, an American lawyer who practiced with an American law firm in Bangkok for three years and then lived in Singapore for two years. Moon disputes that parties can waive the statute of limitations and lack of jurisdiction but cites no authority. He notes that trial would be before a single judge, that contingent fees are prohibited, and that little discovery would be available. While he points out various disadvantages a plaintiff might suffer in a Singapore court, his statements are too vague, general and unsupported to be given much weight. Subsequently plaintiffs submitted a "draft response" to certain questions from Singapore solicitors; those responses appear to the Court to be substantially consistent with the representations made by defendants.

With respect to Indonesia, defendants have submitted statements by Makarim & Taire S, attorneys and counselors at law in Jakarta. They state that Indonesian and foreign parties may submit to the jurisdiction of Indonesian courts by written consent; that under the Indonesian Civil Code, defendants may waive the statute of limitations; that the court can compel the attendance of witnesses; and that third-party indemnity claims are permitted. Indonesian courts would apply Indonesian law, and remedies are available to employees and their survivors under Indonesia's

Workmen's Compensation Law, under the Indonesian Civil Code for negligence, under the Indonesian Carriage by Air Act, and under the Warsaw Convention. (Reddick Decs.) Plaintiffs have made no significant counter-showing.

On the basis of the foregoing analysis of Singapore and Indonesian law, reinforced by the protective conditions of this order, the Court determines that either jurisdiction would offer a reasonably adequate alternative forum for plaintiffs.<sup>5</sup>

## 2. The Private Interest Interest Factors

Relative ease of access to sources of proof. Plaintiffs argue that there is no dispute that the air crash was caused by pilot error, and that the only questions before the Court are who controlled the vessel, who is responsible for selecting Airfast, and what amount of damages should be awarded. These questions do not require production of evidence located in Indonesia or Singapore.

Defendants, on the other hand, deny that negligence on the part of Airfast is established as the sole cause of the crash. While the report of Indonesian authorities who investigated the accident attributed the crash to pilot error and weather conditions, there appears to be evidence of negligence by the controllers who cleared the aircraft for landing despite adverse weather conditions and may have given an incorrect altimeter setting. Inasmuch as the cause of the crash is at the heart of the issues in this litigation, it is essential for the parties to have access to all relevant evidence.

It is not disputed that the operative facts on which liability and damages are premised occurred in Indonesia, and to a lesser extent, in Singapore. These include the maintenance and operation of the aircraft by Airfast, the chartering of the aircraft by Huidbay, and the actions of the crew and the Indonesian air traffic

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<sup>5</sup> The Court also takes judicial notice of Singapore's status as a major center of international trade and commerce and the base of operation in South East Asia for many corporations, American and foreign. This facts lends weight to defendants' assertion of its adequacy as an alternative forum.

controllers. Eyewitnesses and other knowledgeable persons are located there. Records and physical evidence relating to the operation and crash of the aircraft, the activities of defendants, the injuries suffered by plaintiffs, and the post-accident investigation are also located there. It may be, as plaintiffs contend, that other evidence is scattered around the world, but none of it is shown to be located in this district. That the bulk of it is located in Singapore or Indonesia is demonstrated by plaintiffs' consolidated deposition notice which lists 33 named and countless other generically described persons as witnesses respecting the matters described above and notices their depositions to be taken in Toowoomba, Australia, Jakarta, Indonesia, and Singapore. (See Exhibit A, attached)

Availability of compulsory process for and cost of obtaining the attendance of witnesses. No material witness has been shown to be subject to the process of this Court. To compel defendants to go to trial without access to the live testimony of critical witnesses would obviously be unfair. *Gilbert*, 330 U.S. at 511. As heretofore discussed, most if not all of the material witnesses appear to be available either in Indonesia or in Singapore where their attendance may be compelled by subpoena or court order.

Plaintiffs' deposition notice reflects the dimensions which the trials of these cases are likely to assume. A large number of witnesses can be expected to be called and all or nearly all of them would have to be brought from Southeast Asia, if possible, at great expense. Thus, even with willing witnesses, trials in this district would be burdensome.

Jurisdiction over third-party defendants. If the cases are litigated in this district, defendants will not be able to acquire personal jurisdiction over Airfast or other potential foreign third party defendants, such as Indonesia, against whom indemnity claims would lie. Their ability to implead indemnitors in Indonesia and Singapore but not in this district is a factor militating in favor of dismissal. *Piper*, 454 U.S. at 259.

### C. The Public Interest Factors

The three principles underlying the public interest factors are summarized in *Pain v. United Technologies Corp.*, 637 F.2d 775

(D.C. Cir. 1980), cited with approval by the Supreme Court in *Piper*.

First, that courts may validly protect their dockets from cases which arise within their jurisdiction, but which lack significant connection to it; second, that courts may legitimately encourage trial of controversies in the localities in which they arise; and third, that a court may validly consider its familiarity with governing law when deciding whether to retain jurisdiction over a case. Thus, even when the private conveniences of the litigants are nearly in balance, a trial court has discretion to grant *forum non conveniens* upon finding that retention of jurisdiction would be unduly burdensome to the community, that there is little or no public interest in the dispute, or that foreign law will predominate if jurisdiction is retained. (citations omitted.)

*Id.* at 791-92.

These actions brought by foreign seamen lack any significant connection with this forum. Unlike *Piper*, no issue is raised concerning the design or manufacture of a California-produced product, or, for that matter, concerning any California-based activity.<sup>6</sup> While BMD's corporate base of operations is San Francisco, the day-to-day operations of the *Brinkerhoff I* were carried out in Indonesia and Singapore. California has no interest in these actions but Indonesia at least has a substantial one. These actions arise out of the crash of an Indonesian aircraft in Indonesian airspace under control of Indonesian air traffic controllers, subject to Indonesian regulations, and investigated and reported on by the Indonesian government. That they should be adjudicated by Indonesian courts seems entirely appropriate.

The Court also takes into account the adverse impact of protracted litigation such as this on its own docket and on the ability of local litigants to get to trial, and the burden imposed on local jurors required to sit on these actions.

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<sup>6</sup> The fact that these actions arise out of conduct by Indonesians in Indonesia rather than out of design or manufacture of products in the United States makes them even stronger cases for transfer than *Piper*.

Finally, the application of the law of Indonesia if the actions are tried there is consistent with that country's interest in the controversy and not inconsistent with the convenience of these plaintiffs.

"Because the central purpose of any *forum non conveniens* inquiry is to ensure the trial is convenient, a foreign plaintiff's choice [of forum] deserves less deference." *Piper, supra*, at 256. In this case, all of the relevant factors support the conclusion that the actions in this forum must be dismissed subject to appropriate conditions.

### B. American Seamen

The cases of the American seamen raise the question whether *Piper Aircraft Co. v. Reyno, supra* affects the disposition of forum non conveniens motions in Jones Act cases.

Several circuits have followed the rule that once a court has determined that the Jones Act applies to a case, that case should not be dismissed for forum non conveniens. *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Szumlicz v. Norwegian American Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983). *Fisher v. Ajos Nicolas V*, 628 F.2d 308, 315 (5th Cir. 1980), *cert. denied sub nom. Valmas Brothers Shipping S.A. v. Fisher*, 454 U.S. 816 (1981).

The Second Circuit has rejected that view. In *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir. 1983), the court distinguished earlier circuit decisions on the ground that they had not involved forum non conveniens, and said:

That portion of *Bartholomew* cited in *Antypas* sets forth the general rule that "once federal law is found applicable the court's power to adjudicate must be exercised." *Id.* (emphasis added). The court in *Bartholomew* also recognized, however, that in "exceptional situations," such as where the abstention doctrine applies, the district court may dismiss despite the applicability of federal law. *See id.* A case involving forum non conveniens, like one involving abstention, presents just such an exceptional situation. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 67 S. Ct. 839, 841, 91 L.Ed. 1055 (1947) (quoting *Canada Malting Co. v. Paterson*

*Steamship, Ltd.*, 285 U.S. 413, 422-23, 52 S. Ct. 413, 415, 76 L.Ed. 837 (1932).

To summarize, when the Jones Act is applicable federal law is involved and the district court must exercise its power to adjudicate, absent some exceptional circumstances such as the application of the abstention doctrine or, as here, *the equitable principal of forum non conveniens*.

702 F.2d at 48 (emphasis added).

Under *Cruz*, therefore, the district court, on finding that the Jones Act applies, must adjudicate the case but adjudication encompasses the application in appropriate circumstances of the equitable doctrine of forum non conveniens.

The Ninth Circuit, in the recent decision in *Pereira v. Utah Transport, Inc.*, \_\_\_\_ F.2d \_\_\_\_, No. 83-2537 (9th Cir. June 27, 1985), cited these cases and stated in dictum that it agreed with the Fifth, Tenth and Eleventh Circuits on the point that "a choice of law determination must be made before a district court dismisses a case under *forum non conveniens*." (slip op. at 5) It did not address the specific issue whether, after *Piper*, a case subject to the Jones Act may be dismissed for forum non conveniens.

None of the decisions cited above considered the Supreme Court's decision in *Piper*. The Court there reversed a court of appeals decision on the ground that it had "erred in holding that plaintiffs may defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum." 454 U.S. at 247. *Piper* involved product liability actions by foreign plaintiffs against two American manufacturers arising out of an air crash in Scotland. The district court, after evaluating the *Gilbert* factors, had dismissed for forum non conveniens. Among other things, it had determined that Pennsylvania law would apply to the claims against one defendant and Scottish law to the claims against the other. The court of appeals rejected the district court's analysis and found that American law would govern all claims. It con-

cluded that dismissal was not justified when it would result in a change in the applicable law unfavorable to plaintiffs.

The Supreme Court rejected the court of appeals' reasoning as inconsistent with *Gilbert* under which "dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." 454 U.S. at 249.

In recent decisions the Fifth Circuit recognized the possible applicability of *Piper* to Jones Act cases. In *De Oliveira v. Delta Marine Drilling Co.*, 707 F.2d 843, 845 (5th Cir. 1983), the court said in dictum:

We have held that, if United States law applies, a federal court should entertain the suit. *Fisher v. Agios Nicolaos V*, 628 F.2d 308, 315 (5th Cir. 1980), *cert. denied sub nom., Valmas Bros. Shipping, S.A. v. Fisher*, 454 U.S. 816, 102 S. Ct. 92, 70 L.Ed.2d 84 (1981); *Volyrakis v. M/V ISA-BELLE*, 668 F.2d 863 (5th Cir. 1982). *But see Piper Aircraft v. Reyno*, 454 U.S. 235, 257, 102 S. Ct. 252, 266, 70 L.Ed.2d 419, 437 (1981).

*See also Koke v. Phillips Petroleum Co.*, *supra*, 730 F.2d at 218. Subsequently in *Ali v. Offshore Co.*, 753 F.2d 1327 (5th Cir. 1985), the district court had dismissed an action raising both Jones Act and product liability claims after finding that the Jones Act did not apply, without considering the forum non conveniens factors. The court of appeals, after discussing *Piper*, remanded with directions to apply the *Gilbert* factors to determine whether the action should be retained or dismissed. The court said specifically:

In applying the *Gulf Oil* test, the court should consider the *Gulf Oil* factors both as they pertain to the Jones Act claims and the product liability claims.

753 F.2d at 1333 (emphasis added).

In a footnote the court added:

In contrast to the choice of law analysis rejected in *Piper* the choice of law decision in the Jones Act context is a

relatively simple one and is an easy means of reaching a preliminary decision on the forum non conveniens issue. *Litigants remain free to demonstrate that, although United States law would apply, the full panoply of the Gulf Oil analysis leads to the conclusion that the United States forum is inconvenient.*

*Id.*, n.13 (emphasis added).

This statement, albeit dictum, strongly suggests that a Jones Act case may be dismissed for forum non conveniens. Inasmuch as it is found in that part of the opinion which dealt with the product liability claim, its full significance remains clouded.

*Piper*, of course, involved foreign plaintiffs but nothing in that decision suggests that the rule would be different for American plaintiffs. It is also true that it was a product liability action under state law, not a Jones Act case. *Piper*, however, inferentially rejected the notion that forum non conveniens does not apply to cases under the Jones Act. It did so by quoting the following statement from the Third Circuit's opinion which it reversed:

[I]t is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But . . . a dismissal for forum non conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law." Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified. 630 F.2d, at 163-164 (footnote omitted) (quoting *DeMateos v. Texaco, Inc.*, 562 F.2d 895, 899 (CA3 1977), cert. denied, 435 U.S. 904 (1978)).

454 U.S. at 246.

*DeMateos*, on which the Third Circuit had relied, was in fact a case brought under the Jones Act in which the court upheld an order dismissing for forum non conveniens only after determining that the Jones Act did not apply.

The Supreme Court, therefore, clearly had before it the concept of forum non conveniens as it had been applied in Jones Act

cases. Nevertheless it carved out no exception to its broad holding that

The Court of Appeals erred in holding plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.

454 U.S. at 247.

Because the deceased seamen on whose behalf these actions were brought were Americans at the time of their death in the course of their duties, weight must be given to the Congressional purpose of affording a liberal remedy for injury or death of American seamen. Nothing in the statute itself, however, bars dismissal of such a case for *forum non conveniens*. In addition a strong presumption attaches to the choice of forum by those plaintiffs who are residents of the United States, although the presence of American plaintiffs in and of itself is not sufficient to bar dismissal. *Cheng, supra*, 708 F.2d at 1411.

*Piper* instructs, however, that "the central purpose of any *forum non conveniens* inquiry is to ensure the trial is convenient . . ." *Piper, supra*, 454 U.S. at 256. The relevant factors, which have been discussed in the preceding part of this opinion, demonstrate convincingly "that trial in the chosen forum would be unnecessarily burdensome for the defendant . . . [and] the court." *Id.* 454 U.S. at 256 n.23. In reaching that conclusion, the Court takes into account also that these are not run-of-the mill seamen's injury cases. These claims do not arise out of a typical maritime accident where the injury occurs on or about a vessel and the evidence is largely under the shipowner's control. *Instead, they are analogous to foreign aircraft cases in which the relevant evidence is to be found abroad outside the control of the parties.*

## Conclusion

The issue before the Court is whether trial in plaintiffs' chosen forum would be unnecessarily burdensome for defendants. Given the availability of reasonably adequate alternative forums, the relative ease of access to sources of proof in those forums, and the unavailability of compulsory process over any material witnesses, the expense of producing willing witnesses, the inability to acquire jurisdiction over third-party defendants, the lack of any significant connection of the actions and the burdens of a trial in this forum, private and public interest factors outweigh plaintiffs' forum preference, even in the four cases governed by American law.

In order that each plaintiff's interests will be adequately protected, the order dismissing these actions will become effective as to any defendant upon the filing with this Court within 120 days from the filing of this order of a certificate on behalf of the defendant stating that:

1. Defendant has submitted to service of process and jurisdiction in whatever courts of Indonesia and Singapore any plaintiff shall have filed an action within ninety days from the date of filing of this order ("the new actions").

2. Defendant has formally and effectively waived any defense under the statute of limitations arising in any of the new actions which was not available at the time the instant actions were filed in this Court.

3. Defendant agrees to make available in any of the new actions witnesses (either for trial or for deposition) and documents within its control.

4. Defendant waives any objection to the use in any of the new actions of any product of discovery filed in the instant actions.

5. Defendant agrees to satisfy any final judgment rendered against it in any of the new actions.

This order shall become final (i) as to any defendant upon the filing by that defendant of the foregoing certificate in form satisfactory to the court or (ii) as to any plaintiff upon that plaintiff's failure to have filed a new action upon the expiration of

ninety days from the date of filing of this order, whichever shall occur first.

The Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The Court therefore certifies the following questions for interlocutory appeal:

1. Does the Jones Act apply to the actions brought by or on behalf of foreign nationals?
2. To the extent that the Jones Act applies to any of these actions, does it preclude conditional dismissal on forum non conveniens grounds?

IT IS SO ORDERED.

DATED: August 9, 1985

WILLIAM W SCHWARZER  
William W Schwarzer  
United States District Judge

ENTERED IN CIVIL DOCKET  
8/12, 1985

EXHIBIT A

BENTON MUSSLEWHITE, ESQ.  
LAW OFFICES OF BENTON MUSSLEWHITE, INC.  
609 Fannin, Suite 517  
Houston, Texas 77002

JOHN O'QUINN, ESQ.  
O'QUINN, HAGANS & WETTMAN  
3200 Texas Commerce Tower  
Houston, Texas 77002

LYLE C. CAVIN, JR., ESQ.  
CAVIN & LEVY  
600 Montgomery Street  
31st Floor  
San Francisco, California 94111

ATTORNEYS for Plaintiffs  
SHEREEN RAMONA ZIPFEL, et al;  
TEN FONG CRAIG; CHAN LUCK CHEE;  
PATRICK PAUL GRUNKE and VYNER  
GERARD ALBUQUERQUE

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION  
NO. C 83-0603 RPA

SHEREEN RAMONA ZIPFEL, as Survivor of herself and her  
children of her husband; IAN CHARLES ZIPFEL, Deceased,  
Plaintiff

v.

HALLIBURTON COMPANY, et al,  
Defendants

D-30

NO. C 83-0604 RPA

TEN FONG CRAIG, Survivor of WILLIAM HENRY CRAIG,  
Deceased,

Plaintiff

v.

ATLANTIC RICHFIELD Co., et al,  
Defendants

NO. C 83-0605 RPA

CHAN LUCK CHEE,

Plaintiff

v.

McCLELLAND ENGINEERS, INC., et al,  
Defendants

NO. C 83-0606 RPA

PATRICK PAUL GRUNKE

Plaintiff

v.

ATLANTIC RICHFIELD Co., et al,  
Defendants

NO. C 83-0607 RPA

VYNER GERARD ALBUQUERQUE,

Plaintiff

v.

OCEANEERING INTERNATIONAL, INC., et al,  
Defendants

AND RELATED CASES:

NO. C 82-0836 RPA, C 82-1866 RPA, C 82-2565 RPA,  
C 82-2566 RPA, C 82-2568 RPA, C 82-2569 RPA,  
C 83-1022 RPA, C 83-4025 RPA, C 82-1855 RPA

IN RE AIR CRASH DISASTER NEAR PEKANBARU,  
INFONESIA ON APRIL 28, 1984

NOTICE OF INTENT TO TAKE ORAL DEPOSITIONS

- TO: Defendants, Brinkerhoff Maritime Drilling, Inc., Brinkerhoff Maritime Drilling, S.A. and Brinkerhoff Maritime Drilling Pte, Ltd., by and through their attorney of record, Mr. Red M. Clack of Derby, Cook, Quinby & Tweedt, 333 Market Street, Suite 2800, San Francisco, California 94105.
- TO: Defendants, Atlantic Richfield Co. and Arco Oil & Gas Company by and through their attorney of record, Mr. James M. Derr of Belcher, Henzie, Biegenzahan, Chertok & Walker, 333 South Hope Street, Suite 3650, Los Angeles, California 90071.
- TO: Defendants, Hudbay Oil (Malacca Strait) Ltd., Hudbay Oil (Indonesia) Ltd. and Dome Petroleum Corp., by and through their attorney of record, Mr. Moris Davidovitz of Maloney, Chase, Fisher & Hurst, 4 Embarcadero Center, San Francisco, California 94111.
- TO: Defendant, Halliburton Company, by and through its attorney of record, Mr. Grayson S. Staring of Lillick, McHose & Charles, Two Embarcadero Center, San Francisco, California 94111.
- TO: Defendant, McClelland Engineers, Inc., by and through its attorney of record, Mr. Harold Albert Stone of Gudmunson, Siggins & Stone, Russ Building, Suite 710, 235 Montgomery Street, San Francisco, California 94104.
- TO: Defendant, Oceaneering International, Inc., by and through its attorney of record, Mr. Vernon L. Goodin of Bronson, Bronson & McKinnon, 555 California Street, San Francisco, California 94104.
- TO: Defendant, Conoco, Inc. by and through its attorney of record, Mr. Robert J. Finan of Finan, White & Morrison, 333 Broadway, Suite 200, San Francisco, California 94133.

PLEASE TAKE NOTICE that pursuant to Federal Rules of Procedure 30(b)(6), the Plaintiffs, by and through their attorney of record, Benton Musslewhite, will take the oral deposition, before an officer authorized to administer oaths of the following witnesses:

- a. Dr. Michael N. Fox, M.A.P.S., M.A.S.G.P.P. (U.S.), Psychologist;
- b. Rael Duffie, Psysiotherapist;
- c. Kerrie Dixon of International Rehabilitation Associates;
- d. Dr. Bookles;
- e. Custodian of records and treating physicians or rehabilitation specialist from the Connolly Street Rehabilitation Center, Perth, Western Australia;
- f. Sir George Bedbrook, treating physician;
- g. Custodian of the records and accounts of Saint John of God Hospital, Subiaco;
- h. Dr. E. G. Griffiths;
- i. Custodian of records and accounts of Royal Perth Rehabilitation hospital;
- j. Jim Croft, barge foreman, who is Australian, if located can be arranged in Australia;
- k. The depositions of friends, acquaintances and relatives of Grunke who knew of him both before and after the accident;
- l. Patrick Paul Grunke, himself;
- m. Mr. R. D. McKellar-Hall and Mr. N. J. Bedolin

Said depositions will commence at 10:00 A.M. on Monday, October 15, 1984 and will continue on Tuesday, October 16, 1984, Wednesday, October 17, 1984 and Thursday, October 18, 1984 at the office of Patrick Nunan of Cleary & Lee, 2 Russell Street, Toowoomba, Australia and other places designated thereafter.

On Monday, October 22, 1984, beginning at 10:00 A.M., in Jakarta, Indonesia at the Jarkarta Hilton Hotel, and continuing on Tuesday, October 23, 1984, Wednesday, October 24, 1984, and Thursday, October 25, 1984 at other places designated thereafter, the depositions of the following witnesses will be taken.

- a. Custodian of the records and principal investigator of the investigating authorities of Indonesia who investigated the air crash in question;
- b. Any witness who lived in and around the site of the crash in Pekanbaru, Indonesia;
- c. The individuals who were present in the control tower and/or control room at the time of the attempted landing by the aircraft in question;
- d. The Air Controllers at Pekanbaru Airport;
- e. Any and all officers or representatives of PT Airfast Services Indonesia;
- f. Mr. E. C. Andrews, President of PT Airfast Services Indonesia;
- g. Mr. T. E. Steen, General Manager of PT Airfast Services Indonesia;
- h. Florence C. Forrester (if found in Indonesia);
- i. Mr. A. S. Clark, Contracts Manager of PT Airfast Services Indonesia;
- j. Tony Clark of the Jakarta office of PT Airfast Services Indonesia;
- k. R. G. Sawka of Hugbay Oil (Malacca Strait) Ltd. in Jakarta;
- l. Custodian of the records and principal officer or person with knowledge with the Indonesian government which certifies and authorizes flights into Indonesia by commercial aircraft (the equivalent of the CAB and National Transportation Safety Board in the United States);

m. Don Burgland, Neal Craig, Ron Panas, Ian Scott, Jim Croft, all members of the shifts of the crews at the time of the accident in question;

n. Custodian of records and accounts of the hospitals in Pekanbaru and/or Jakarta in which any of the Plaintiffs were sent for care and treatment;

o. All doctors who treated all Plaintiffs in Pekanbaru and/or Jakarta;

p. The custodian of the records and principal authority who issued the death certificates;

q. The principal and operating manager in Jakarta and/or Pekanbaru or any other location in Indonesia of the following companies; Brinkerhoff Maritime Drilling Corporation, any foreign subsidiary of Brinkerhoff Maritime Drilling Corporation, or subsidiary that has an office in the Far East; Huidbay Oil (Malacca Strait) Ltd. and any other sister companies or subsidiaries of the Huidbay group of companies that have offices in the Far East, particularly Indonesia; Atlantic Richfield Indonesia, Inc., and all other Atlantic Richfield Indonesia, Inc., and all other Atlantic Richfield companies who may have offices in the Far East, particularly Indonesia; Oceaneering International, Inc., and all of its subsidiaries or sister companies who have offices in the Far East, particularly in Indonesia; McClelland Engineers, Inc., and any of its subsidiaries or related companies who have offices in the Far East, particularly in Indonesia; Halliburton Industries, Inc., or any of its subsidiaries or related companies that have offices in the Far East, particularly in Indonesia;

r. Caltex Hospital in Pekanbaru or Jakarta.

On Monday, October 29, 1984, commencing at 10:00 A.M. in Singapore at the Singapore Shangai La Hotel, and continuing Tuesday, October 30, 1984, Wednesday, October 31, 1984, Thursday, November 1, 1984 and Friday, November 2, 1984 at other places designated thereafter, the depositions of the following witness will be taken:

- a. Chan Luck Chee (if wanted by Defendants);
- b. Vyner Albuquerque (if wanted by Defendants);
- c. Mrs. Shereen Ramona Zipfel (if wanted by Defendants);
- d. Mrs. Ten Fong Craig (if wanted by Defendants);
- e. Dr. C. M. Ling;
- f. The custodian of the records and accounts of Mount Elizabeth Hospital;
- g. All witnesses named above in connection with Jakarta and Pekanbaru, Indonesia who are present in Singapore rather than Indonesia, including but not limited to the various Corporate representatives of the Defendant corporations and their subsidiaries or related companies; investigative authorities; representatives and officers of PT Airfast of Singapore as well as PT Airfast Indonesia; members of the crew of the BRINKERHOFF I at the accident in question on either shift;
- h. All officers of the Defendant corporations and their subsidiaries and/or related companies, as named above, whose office is in Singapore and who is the managing officer of those particular offices;
- i. All investigative authorities of Singapore who may have investigated the crash in question;
- j. All authority of Singapore who may have issued licenses and/or renewed licenses with respect to commercial operation of aircraft in or out of Singapore;
- k. Mr. Dave Lowry;
- l. Mr. Larry Coe;
- m. Dr. Freddie B. T. Chew;
- n. Custodian of accounts and records at Saint Mark's Hospital in Singapore;
- o. Custodian of records and accounts at Mount Alverina Hospital;

- p. Dr. Loong Si Chin;
- q. J. Peter Gemeinhardt of McClelland Engineers, S.A.;
- r. Person in charge of maintenance of PT Airfast planes at Seletar Airport in Singapore;
- s. Rod Stanley of Oceaneering;
- t. Keith Manson of Oceaneering;
- u. Dr. N. Knunaratnam;
- v. Custodian of records and accounts at Singapore General Hospital, Singapore;
- w. Dr. R. Sundarason;
- x. Any other witnesses or persons who were on board the PT Airfast plan that crashed who reside in Singapore, and any other witnesses or persons who worked in supervisory or responsible capacities on board the BRINKERHOFF I during the period of time that the accident in question occurred;
- y. Any other doctors or hospitals in which any of the Plaintiffs might have been treated not mentioned above and who are located in Singapore.
- z. Various friends, acquaintances and relatives of the decedents and Plaintiffs who knew the Plaintiffs and who are located in Singapore.

Plaintiff requests that all of the above witnesses bring all documents which pertain to the matters mentioned in connection with the Notice of Depositions and all documents that may have a connection with the accident in question, either directly or indirectly.

You are invited to attend and cross-examine.

Respectfully submitted,

LAW OFFICES OF BENTON  
MUSSELWHITE

By: BENTON MUSSELWHITE  
609 Fannin, Suite 517  
Houston, Texas 77002  
(713) 222-2288

By: JOHN O'QUINN  
3200 Texas Commerce Rd.  
Houston, Texas 77002  
(713) 223-1000

By: LYLE C. CAVIN, JR.  
600 Montgomery Street  
31st Floor  
San Francisco, Calif.  
(415) 788-8833



APPENDIX E

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

No. C-82-0836 WWS

And Related Actions:

C-82-2565 WWS, C-82-2566 WWS, C-82-2568 WWS,  
C-82-2569 WWS, C-83-0603 WWS, C-83-0604 WWS,  
C-83-0605 WWS, C-83-0606 WWS, C-83-0607 WWS,  
C-83-1022 WWS

CORA E. SHERRILL, etc.,

Plaintiffs,

v.

BRINKERHOFF MARITIME DRILLING CORPORATION, et al.,

Defendants.

ORDER TO SHOW CAUSE AND TEMPORARY  
RESTRAINING ORDER

The application of defendants for a temporary restraining order restricting plaintiffs from filing and/or prosecuting actions arising out of the air crash on April 28, 1981 of an aircraft operated by PT Airfast Services in Indonesia in the state courts of Texas or any other court in the United States having been filed herein on November 18, 1985; and

The Court having considered the application and papers filed in support thereof and having reviewed the letter of plaintiffs' counsel dated November 19, 1985 agreeing to not oppose such application subject to certain terms and conditions contained therein; and

The Court having participated in a telephone conference with certain counsel for plaintiffs and certain counsel for defendants on November 20, 1985; and

The Court finding that this Order to Show Cause and Temporary Restraining Order is in the interest of justice;

IT IS HEREBY ORDERED that plaintiffs MURRAY ROBERT COLE, VYNER GERARD ALBUQUERQUE, CHAN LUCK CHEE, TEN FONG CRAIG, PATRICK PAUL GRUNKE, TIMOTHY PETER JONES, DAVID ALFRED LOWRY, DAWN D. SCHWARTZ and SHEREEN RAMONA ZIPFEL and their attorneys shall show cause, if any there be, why an injunction should not be entered enjoining them from proceeding in the state courts of Texas or any other court in the United States on the basis of the same theories or causes of action asserted in the within actions before this Court. This matter will be heard in this Court on December 13, 1985 at 11:00 a.m. All papers in opposition to issuance of such injunction shall be filed and served (by overnight express mail or courier) by December 6, 1985, and any reply thereto shall be filed by noon, December 11, 1985 and served on that day by overnight express mail or courier.

IT IS FURTHER ORDERED that, pending hearing and decision on the above referenced Order to Show Cause, the above-named plaintiffs and their attorneys are hereby restrained from filing and/or prosecuting actions in the state courts of Texas or any other court in the United States (including, without limitation, Action No. 83-32768 in the District Court of Harris County, Texas (157th Judicial District)) based on the theories and causes of action asserted in the within actions before this Court.

DATE: November 22, 1985.

WILLIAM W SCHWARZER  
William W Schwarzer  
United States District Judge

APPENDIX F  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

No. C-82-0836-WWS

CORA E. SHERRILL, Individually and as Administratrix of the  
Estate of Max O. Sherrill, deceased,  
Plaintiff,  
v.

BRINKERHOFF MARITIME DRILLING, a corporation, et al.,  
Defendants.

No. C-82-2565-WWS

TIMOTHY P. JONES,  
Plaintiff,  
v.

BRINKERHOFF MARITIME DRILLING, a corporation, et al.,  
Defendants.

No. C-82-2566-WWS

DAVID ALFRED LOWRY,  
Plaintiff,  
v.

BRINKERHOFF MARITIME DRILLING, a corporation, et al.,  
Defendants.

No. C-82-2568-WWS

DAVID S. SCHWARTZ, as Administratrix of the Estate of James  
C. Owen,

Plaintiff,

v.

BRINKERHOFF MARITIME DRILLING, a corporation, et al.,  
Defendants.

No. C-82-2569-WWS

MURRAY ROBERT COLE,

Plaintiff,

v.

BRINKERHOFF MARITIME DRILLING, a corporation, et al.,  
Defendants.

No. C-83-0603-WWS

SHEREEN RAMONA ZIPFEL, Individually and as Administratrix  
of the Estate of Ian Charles Zipfel, deceased,

Plaintiff,

v.

HALLIBURTON CO., et al.,  
Defendants.

No. C-83-0604-WWS

TEN FONG CRAIG, Individually and as Administratrix of the  
Estate of William Henry Craig, deceased,

Plaintiff,

v.

ATLANTIC RICHFIELD CO., et al.,  
Defendants.

F-3

No. C-83-0605-WWS

CHAN LUCK CHEE,

Plaintiff,

v.

McCLELLAND ENGINEERS, INC.,

Defendants.

No. C-83-0606-WWS

PATRICK PAUL GRUNKE,

Plaintiff,

v.

ATLANTIC RICHFIELD Co., et al.,

Defendants.

No. C-83-0607-WWS

VYNER GERARD ALBUQUERQUE,

Plaintiff,

v.

OCEANEERING INTERNATIONAL, INC.,

Defendants.

No. C-83-1022-WWS

MICHAEL WAYNE CRAIG,

Plaintiff,

v.

BRINKERHOFF MARITIME DRILLING, et al.,

Defendants.

The application of defendants for a Temporary Restraining Order or for Injunction restricting plaintiffs from filing and/or prosecuting actions in the state courts of Texas or any other court in the United States arising out of the air crash on April 28, 1981 of an aircraft operated by PT Airfast Services in Indonesia having been filed herein on November 18, 1985; and

The Court having issued its Order to Show Cause and Temporary Restraining Order on November 22, 1985 so restraining plaintiffs pending hearing and decision on the Application for Permanent Injunction; and

The application for injunction having come before the Court via telephone hearing on December 13, 1985; and

The Court having considered the application and papers filed in support and in opposition thereto and having heard the arguments of counsel; and

The Court finding that issuance of an injunction is in the interest of justice;

It having been brought to the attention of the Court by the defendants that the plaintiffs have not filed suit in Indonesia or Singapore and that it is now therefore appropriate for this Court to enter a final judgment; and

The Court finding that it should now enter a final judgment in this cause;

The Court hereby enters the following Findings of Fact and Conclusions of Law:

A. Findings of Fact

1. The within actions were brought by or on behalf of individuals who were killed or injured in an air crash in Indonesia. All were brought under the Jones Act, 46 U.S.C. § 688, and most also alleged claims under general maritime and common law. Some of the actions were originally filed in other federal district courts but eventually all of the actions were filed in the United States District Court for the Northern District of California and were related pursuant to Local Rule 205-2 for assignment to a single judge.

2. Defendants filed motions to dismiss for forum non conveniens, which were initially denied by subsequently granted. On August 12, 1985, the Court entered a Memorandum of Opinion and Order holding that foreign law applied to the claims of the foreign plaintiffs; American law applied to the claims of the American plaintiffs and decedents; but that all claims should be

dismissed on grounds of forum non conveniens provided the defendants would agree to appear in any action filed by any plaintiff in Singapore or Indonesia within 90 days from the date of filing of such Memorandum of Opinion and Order.

3. None of the plaintiffs have filed suit in Indonesia or Singapore within such 90 day period and it is now appropriate to enter final judgment in these actions.

4. Soon after the filing of the within actions in federal court, certain plaintiffs filed a consolidated action (Action No. 83-32768) in the District Court of Harris County, Texas (157th Judicial District) against certain defendants which sets forth claims of peronal injury and death arising out of the above-referenced air crash in Indonesia of April 28, 1981.

5. By various agreements, no action was taken in the above-referenced state action until it was determined whether this Court would accept or decline jurisdiction and retain venue.

6. After August 12, 1985, plaintiffs re-activated the above-referenced state court action and required substantive responses from defendants, whereupon defendants applied to this Court for a temporary restraining order followed by an injunction.

7. On November 22, 1985, this Court issued an Order to Show Cause and Temporary Restraining Order restraining plaintiffs from proceeding with actions in the state courts of Texas or any other court in the United States arising out of the above-referenced air crash, pending hearing and decision on the Application for Permanent Injunction.

8. The continued prosecution of the above-referenced Texas state court action and the filing of any similar action in any other court in the United States would unduly impose upon this Court's jurisdiction and be contrary to the protection and effect of this Court's Memorandum of Opinion and Order and its final judgment being hereby entered.

9. On December 13, 1985 this Court orally issued its permanent injunction as requested by defendants.

B. Conclusions of Law.

1. This Court has jurisdiction to grant the within injunction.
2. Since, following the entry of this Court's Memorandum of Opinion and Order entered August 12, 1985, the plaintiffs have not filed suit in Singapore or Indonesia within ninety days from the date of that order, it is now appropriate to enter final judgments dismissing these cases on grounds of forum non conveniens.
3. In view of the foregoing, the requested injunction should issue.

C. Permanent Injunction.

Based upon the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED that plaintiffs MURRAY ROBERT COLE, VYNER GERARD ALBUQUERQUE, CHAN LUCK CHEE, TEN FONG CRAIG, PATRICK PAUL GRUNKE, TIMOTHY PETER JONES, DAVID ALFRED LOWRY, DAWN D. SCHWARTZ and SHEREEN RAMONA ZIPFEL and their attorneys are hereby permanently enjoined from filing and/or prosecuting actions in the state courts of Texas or any other court in the United States (including, without limitation, Action No. 83-32768 in the District of Harris County, Texas (157th Judicial District)) arising out of the air crash on April 28, 1981 of an aircraft operated by PT Airfast Services in Indonesia which air crash is the basis of the claims asserted in the within actions before this Court. This permanent injunction is effective as of December 13, 1985.

D. Final Judgment.

Since it has now been made known to the Court that none of the plaintiffs filed suit in Singapore or Indonesia within ninety days from the date of this Court's Memorandum of Opinion and Order entered August 12, 1985, it is now appropriate for the Court to enter a final judgment in these causes; **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that these cases are hereby dismissed on grounds of forum non conveniens. *This is a Final Judgment.*

Dated: 1/30/1986.

**WILLIAM W. SCHWARZER**  
William W. Schwarzer  
United States District Judge



## APPENDIX G

### UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed Nov. 24, 1987

Cathy A. Catterson, Clerk  
U.S. Court of Appeals

Nos. 86-1815, 86-1832, 86-1834, 86-1835, 86-1836

D.C. Nos.

CV-83-0603-WWS, CV-83-0604-WWS, CV-83-0605-WWS,  
CV-83-0606-WWS, CV-83-0607-WWS

#### ORDER

SHEREEN RAMONA ZIPFEL, Individually and as Administratrix  
of Ian Charles Zipfel, deceased,  
Plaintiff-Appellant,

v.

HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY;  
CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME  
DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO,  
INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUSBAY  
OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING,  
PTD, LTD.; HUSBAY OIL (MALACCA), LTD.; DOME PETRO-  
LEUM, LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND  
GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; and  
EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

TEN FONG CRAIG, Individually and as Administratrix of the  
Estate of William Henry Craig, deceased,

Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME COR-  
PORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTI-  
NENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL &  
GAS COMPANY, LTD.; HUSBAY OIL, LTD. (INDONESIA); BRIN-  
KERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME

DRILLING, PTE, LTD.; HUSBAY OIL (MALACCA), LTD.; DOME PETROLEUM LTD.; DOME PETROLEUM CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

CHAN LUCK CHEE,

Plaintiff-Appellant,

v.

MCCLELLAND ENGINEERS, INC.; MCCLELLAND ENGINEERS, S.A.; MCCLELLAND ENGINEERS SDN. BHD.; HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUSBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME DRILLING, PTE, LTD.; DOME PETROLEUM LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

VYNER GERARD ALBUQUERQUE,

Plaintiff-Appellant,

v.

OCEANEERING INTERNATIONAL, INC.; OCEANEERING INTERNATIONAL, SDN, BHD.; HALLIBURTON COMPANY; ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUSBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, PTE, LTD.; HUSBAY OIL (MALACCA), LTD.; DOME PETROLEUM, LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; and EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

PATRICK PAUL GRUNKE,

Plaintiff-Appellant,

v.

ATLANTIC RICHFIELD COMPANY; CROWLEY MARITIME CORPORATION; BRINKERHOFF MARITIME DRILLING, INC.; CONTINENTAL OIL COMPANY (CONOCO, INC.); HUDSON BAY OIL & GAS COMPANY, LTD.; HUSBAY OIL, LTD. (INDONESIA); BRINKERHOFF MARITIME DRILLING, S.A.; BRINKERHOFF MARITIME DRILLING, PTE, LTD.; HUSBAY OIL (MALACCA), LTD.; DOME PETROLEUM LTD.; DOME PETROLEUM CORPORATION; ARCO OIL AND GAS CORPORATION; PT AIRFAST SERVICES INDONESIA; AND EXQUISITOR HELICOPTER CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court  
for the Northern District of California  
William W. Schwarzer, District Judge, Presiding

Argued and Submitted February 9, 1987  
San Francisco, California  
Opinion filed June 23, 1987

Before: SCHROEDER, WIGGINS and THOMPSON, Circuit Judges.

Appellees' Motion to Supplement Petition for Rehearing filed September 1, 1987 is GRANTED.

The opinion filed herein on June 23, 1987 is amended pursuant to the Order Amending Opinion. With this amendment, the panel as constituted above has voted to deny the Appellants' and the Appellees' petitions for rehearing and suggestions for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Appellants' and the Appellees' petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.



The following corporations are listed, pursuant to the provisions of Rule 28.1:

#### HALLIBURTON COMPANY

Al-Rushaid Taylor Diving Ltd.  
AMSITO Oil Well Services (Malaysia) Sdn. Bhd.  
Arabian Halliburton Services Company Limited [Dissolved]  
British Underwater Engineering Limited  
Brown & Root—Egyptian Constructors S.A.  
Brown & Root—Alireza W.L.L.  
Brown & Root Orient, S.A.  
Brown & Root (Malaysia) Sdn. Bhd.  
Brown & Root Constructores Petroleros de Venezuela, C.A.  
Brown & Root Arabia, Limited  
Brown & Root—Malta Limited  
Brown & Root—Saudi Limited  
Brown & Root—Wimpey Highlands Fabricators Limited  
Brown & Root Mid East L.L.C.  
Brown & Root Ingenieros Petroleros de Venezuela, C.A.  
Brown & Root Nigeria Limited  
Brown & Root—Kokan Offshore Constructors, S.A.  
Brownaker Offshore A/S  
Burro Chief Copper Company  
China Brown & Root Marine Engineering and Construction Company, Ltd.  
COES-Brown & Root Marine Construction Company Limited  
Concretos Industriales, C.A.  
Constructores de Venezuela, Brown & Root, Inc., C.A.  
Contratistas del Lago, C.A.  
Corporacion de Construcciones de Compeche, S.A. de C.V.  
Diving Contractors (Malaysia) Sendirian Berhad  
Equipos del Lago, C.A.  
Highlands Underwriting Agents Limited  
Highlands Fabricators Pension Trustees Limited  
KBV Trenching A/S  
Martec—Engenharia E Obras Ltda.  
MI Drilling Fluids  
Moroccan Engineers & Constructors  
National Engineering & Construction Co.  
NKK—Brown & Root Overseas, S.A.  
NUS Corporation  
Otis of Nigeria Limited  
Otis—Saudi Limited  
P.T. Brown & Root Indonesia  
Pearl River Sand & Gravel Company  
Port Harcourt Oil Services Limited  
Prestressed Concrete Products Company, Inc.  
Prinver, S.A. de C.V.  
Productos Industriales de Veracruz S.A. de C.V.  
Raymond—Brown & Root, C.A.  
Rezayat—Brown & Root E.C.

SBR Offshore Limited  
Servicios Tecnicos Brown & Root, S.A.  
Siam Brown & Root Limited  
Wilbar Offshore A/S

#### **OCEANEERING INTERNATIONAL, INC.**

Hydrospace International (Sharjah) Limited  
Monex Ltd.  
Monocean-Montreal Oceaneering Engenharia Submarine Ltda.  
Ocean Systems Engineering Limited  
Ocean Systems Do Brasil Servicos Subaquaticos Ltda.  
Ocean Systems Engineering, Inc.  
Oceanal, S.A. de C.V.  
Oceaneering International (Ireland) Ltd.  
Oceaneering International A.G.  
Oceaneering Geotechnical, Inc.  
Oceaneering Underwater GmbH  
Oceaneering New Zealand Limited  
Oceaneering International (M) Sdn. Bhd.  
Oceaneering do Brasil Servicos Submarinos Ltda.  
Oceaneering Limited  
Oceaneering International Services, Ltd.  
Oceaneering Australia Pty. Ltd.  
Oceaneering International Sdn. Bhd.  
Oceaneering Services Limited  
Oceaneering A/S  
Oceaneering Geoscience Ltd.  
Oceaneering International (Netherlands) B.V.  
P.T. Calmarine  
Petro-Charter Associates  
Q-S Vessel Joint Venture  
QAF-Solus Offshore Sdn. Bhd.  
Servicios Marinos Oceaneering Chile Limitada  
Solus Oceaneering (Malaysia) Sdn. Bhd.  
Solus Ocean Systems, Inc.  
Solus Emirates  
Solus AG  
Solus Schall (Nigeria) Limited  
Solus Schall Limited  
Solus Offshore Ltd.  
Solus Oceaneering Espanola, S.A.  
Steadfast Oceaneering, Inc.

#### **McCLELLAND ENGINEERS, INC.**

Fugro (Japan) K.K.  
Fugro-McClelland B.V.  
McClelland Management Services  
McClelland Suhami, Ltd.  
Oserco B.V.

